JAN 8 1913
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,

against

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING & OIL COMPANY,
Appellees.

No. 279

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Appellant's Brief of Argument and Reply Brief.

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IN THE

Supreme Court of the United States.

EDMUND BURKE,
Appellant,

AGAINST

THE SOUTHERN PACIFIC RAILROAD COMPANY, KERN TRADING AND OIL COMPANY, *et al.*,
Appellees.

Appellant's Brief of Argument and Reply Brief.

This suit is before the Court on questions certified by the Circuit Court of Appeals on appeal to it from a decree of the Circuit Court dismissing the bill on demurrer thereto.

In view of the bulk of appellant's principal brief and the number of citations therein collated, the appellant desires to endeavor to further assist the Court by preparing an additional memorandum, the object of which will be to state somewhat more concisely and simply certain of the fundamental principles of law upon which the decision of the case will depend, and also to present certain aspects of the matter from somewhat different points of view than those adopted in the principal brief. It will

also contain our reply to the appellees' answering brief.

We shall first state, for the full information of the Court and without limiting ourselves to the language of the certificate——

I. The Essential Facts Involved in this Action.

1. The claim of the appellees is primarily based upon the original grant contained in the Act of Congress of July 27, 1866 (14 Stat., 292).

2. By the express language of this grant it was intended only to apply to "every alternate section of public land, *not mineral*," and it was provided further that "*all mineral lands be*, and the same are hereby excluded from the operations of this act." Patents "confirming to said Company the right and title to said lands" were authorized by Sec. 4.

3. To avoid danger of injustice to the Railroad Company it was further provided that in lieu of any mineral lands "a like quantity of unoccupied and unappropriated **agricultural** lands * * * may be selected."

4. The original grant of 1866 was confirmed with modifications by the Joint Resolution of June 28, 1870.

5. In this Joint Resolution the exceptions of the original grant were expressly reiterated and confirmed, the language being that upon the report that any section of the Railroad had been constructed as required by law "it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company * * * *expressly saving and reserving* all the rights of actual settlers

together with the other conditions and restrictions provided for in the third section of said Act approved July 27th, 1886" (*i. e.* among other things the restriction as to mineral lands).

6. At some time prior to May 14th, 1892, the Railroad filed an application for certain lands to which it claimed to be entitled by virtue of construction of a portion of the road.

7. On May 9th, 1892, one Madden, Land Agent of the Company, made an affidavit accompanying a list of lands, to the effect that the list in question was a correct list of a portion of the public lands claimed by the Railroad and that: "the lands are vacant, unappropriated and are not interdicted mineral or reserved lands and are of the character contemplated by the grant," etc. The list of lands accompanying Madden's affidavit included the lands described in the bill of complaint herein (Bill, Sec. 12).

8. The bill alleges that—

> "prior to the 9th day of July (error for May), 1892, all of the said lands mentioned and described herein were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws of the United States, and said several and divers mining locations were made by said divers citizens of the United States after a discovery of mineral on each of said mining claims embraced therein,"

and that, therefore, the lands in question were not public lands which could be patented under the Railroad grant, but were segregated by reason of their being mineral lands and because of these locations (Bill, Section 10; Certificate fol. 2).

9. It is also alleged that the Railroad *knew the lands in question were mineral lands* (Bill, Sec. 12).

10. It is also alleged that all said mining locations had been, prior to the application of the Railroad for patents, duly recorded in the office of the Recorder of the Coalinga Mining District, which was the proper place for recording such mining locations, and that the Railroad had knowledge of these facts (Bill, Sec. 11).

11. It is also alleged that the lands in question now are and at all times were mineral lands of great value (Bill, Sec. 5).

12. Two years and more elapsed before the patent in question was issued. During this period the bill and the second question certified *show that there was no investigation of, or hearing upon the question of the nature of those lands, and that no determination was made by the land office or Interior Department to the effect that they were agricultural and not mineral lands.* Various steps that were taken are set forth in the appendix to our principal brief (pp. 451-457).

13. On June 28th, 1894, the Commissioner of the Land Office approved the issue of the patent; but expressly excluded from this approval and from the transfer—

> "*all mineral lands* should any such be found in the tracts aforesaid" (Bill, Sec. 14; Appellant's Principal Brief, p. 456).

14. On July 10th, 1894, a patent was issued to the Railroad purporting to grant the lands in question.

The patent does not recite that the Congressional grants excluded non-mineral land. It does not re-

cite that the lands had been examined and ascertained to be non-mineral lands. It does not recite any notice to the prior locators by publication or otherwise; nor the taking of any steps whatsoever to comply with the directions of the Joint Resolution of 1870 directing the "saving" of all the rights, conditions and restrictions therein enumerated. *Nor does it in any way decide the lands to be agricultural and non-mineral lands,* such as were alone to be granted under the terms of the original Congressional enactments.

It simply consists of (1) numerous recitals (partly erroneous) of the terms of the Congressional grant; (2) a recital of the construction of a section of the Railroad in question; (3) a recital that the lands in question have been "duly listed under the act aforesaid" by the authorized agent of the Railroad; (4) a recital that the tracts in question are coterminus to the constructed line of road; (5) a description of the lands with their area; and (6) it then states that the United States of America—

> "have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. YET EXCLUDING AND EXCEPTING 'ALL MINERAL LANDS' SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID, but this exclusion and exception, according to the terms of the statute, shall not be constructed (*sic*) to include 'coal and iron lands'."

15. The bill then shows that the Railroad assented to the terms and conditions of the Congressional grants and accepted and recorded the patent in question (Bill, Sec. 19).

16. The bill alleges that the patent was issued without jurisdiction on the part of the Land Office (Bill, Sec. 17).

17. The bill then shows that the Railroad Company has never at any time had any actual, open, peaceable, notorious, public and physical possession of any part of the lands in question, but the lands have been at all times wild, open and unoccupied (Bill, Sec. 19; Certificate, fols. 2 and 3).

18. It is specifically alleged that the locators, under the prior mineral locations, never received notice of the Railroad's application for patent and never had any opportunity to contest the same; that no hearing was had to determine the mineral or agricultural nature of the lands and *that the patent issued without any such determination,* although the lands thus claimed to be patented were located within six miles of mining locations made pursuant to the mining laws of the United States, all of which was known to the Railroad, and that the lands in question were not more valuable for agricultural than mining purposes (Bill, Sec. 20-21; Certificate fol. 2).

19. On March 3rd, 1909, appellant and others entered on the lands in question and made mining locations on each quarter section thereof, pursuant to the mining laws of the United States, all of which were duly filed on March 6th, 1909, in the office of the Recorder of the County of Fresno, within which County appellant's lands are situated (Bill, Sec. 22).

20. Contemporaneously with the making of such locations there was a discovery of mineral by the locators (*id*).

21. That the lands had, prior to said location by appellant, been designated by the Department of the Interior as lands more valuable for mining than agricultural purposes (Bill, Sec. 23, Certificate fol. 3); that each of the said mining claims thus located is worth upwards of Sixty Thousand Dollars ($60,000) (Bill, Sec. 26).

22. The bill, therefore, prays that the appellees be estopped from claiming any right, title and interest in and to any of the lands involved in the suit, etc.

23. To this bill demurrers were interposed.

24. At the hearing in the Circuit Court the bill was dismissed, the curt opinion of Judge Ross being, however, based upon the opinion and record in *Roberts* v. *Southern Pacific Co.*, 186 Fed. Rep., 934, which, as we shall allow, differed materially from this case.

25. As a result of the appeal taken to the Circuit Court of Appeals, seven questions were certified to this Court. These questions are set forth on pp. 8 and 9 of Appellant's principal brief, and are also quoted and answered in Points XVI and XVII of this brief (*infra*).

II. The Points to be Considered upon this Appeal.

Inasmuch as the first, second, third, fourth and seventh questions depend largely, if not entirely, upon the decision of the same fundamental principles of law, it has seemed to us that, for purposes of the argument of this cause, it will facilitate the Court to have the appeal presented, first, by a consideration of the general principles involved, and,

secondly, by an application of these general principles to the particular questions certified.

We accordingly respectfully submit to the Court the following propositions:

POINT I.

Congress never intended that the Southern Pacific Railroad Land Grant should include mineral lands.

This is perfectly clear from the express language of Section 3 of the original grant of July 27th, 1866 (see p. 401, Appellant's Principal Brief), excluding mineral lands and giving the right of substitution of agricultural lands in lieu thereof, and also by the language of the Joint Resolution of 1870 in which the reservation of mineral lands was emphasized by the provision—

> "expressly saving and reserving all the rights of actual settlers together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866."

This is precisely in line with our uniform national policy which has never contemplated the exploitation of mineral resources by railroads receiving land grants.

The United States never chartered an East India Company. Neither did the Federal Government ever make a grant to a railroad limited only by metes and bounds. Invariably the mineral reservation appears, and in every case this reservation is explained by and correlated to other statutes controlling mineral lands. It is plain that the railroads were granted the farm and ranch and

timber values only, and that the mineral values were intended to be withheld from them. The following is a summary of the principal enactments.

A. Railroad Land Grants.

UNION PACIFIC, Act of July 1, 1862 (12 Stat., 489). The reservation was in the form of a proviso, "that all mineral lands shall be excepted from the operation of this act." As evidencing the estimate made by Congress of the value of the grant, it is also provided that lands not sold by the Union Pacific Railroad within three years after its completion shall be subject to settlement and preemption "at a price not exceeding $1.25 per acre, to be paid to said company."

NORTHERN PACIFIC, Act. of July 2, 1864 (13 Stat., 365). The mineral reservation is a proviso in Sec. 3 of the Act (13 Stat., 368).

ATLANTIC & PACIFIC, Act. of July 27, 1866 (14 Stat., 292). This is the statute involved in this appeal.

CALIFORNIA & OREGON, Act of July 25, 1866 (14 Stat., 239). "Every alternate section of public land, not mineral."

IRON MOUNTAIN, Act of July 4, 1866 (14 Stat., 83). Mineral lands were excluded by a proviso, and it was also expressly stipulated that a right of way only would be granted where the railroad had to be located on mineral lands.

LITTLE ROCK & FORT SMITH, Act of July 28, 1866 (14 Stat., 338). "*Provided,* that all mineral lands within the limits of this grant and the grant made in section two of this act are hereby reserved in the United States." See also Act of February 9, 1853 (10 Stat., 155).

WESTERN PACIFIC, Act of July 1, 1862 (12 Stat., 489). Mineral lands were excepted by a proviso.

TEXAS & PACIFIC, Act of March 3, 1871 (16 Stat.,

573). "Every alternate section of public land, not mineral."

B. Contemporaneous General Enactments.

Act of May 30, 1862 (12 Stat., 409). The privilege of settlement upon unsurveyed lands was extended to California, but with the proviso that the privilege did not include mineral lands.

Act of January 30, 1865 (13 Stat., 567). No act passed at the first session of the 38th Congress "granting lands to states or corporations to aid in the construction of roads or for other purposes * * * shall be so construed as to embrace mineral lands."

Act of July 26, 1866 (14 Stat., 251). This was the general permission to explore and occupy mineral lands in conformity with local customs.

Act of July 4, 1866 (14 Stat., 85). Relates to Nevada, but contains the clause carried into Sec. 2318 of the Revised Statutes, "In all case lands valuable for mines of gold, silver, quicksilver or copper shall be reserved from sale." In the Revised Statutes, the clause read "lands valuable for *minerals.*"

Act of May 10, 1872 (17 Stat., 91). This is now the controlling statute on mineral location.

Act of February 11, 1897 (29 Stat., 526). "Petroleum lands may be entered and patented under the provisions of the laws relating to placer mineral claims." See Act of July 9, 1870 (16 Stat., 217). Existing rights are protected by this statute.

From this review it is manifest (1) that Congress always intended to retain title in the United States to mineral lands; and (2) that mineral lands, including petroleum deposits, remain subject to entry, location and patent by private citizens. Every word in every statute shows the clear-

est intention on the part of Congress not to let the railroads take lands without regard to their mineral quality.

POINT II.

It appears, without contradiction, that the Railroad Company itself never had any right to expect that it would receive a grant of mineral lands.

This appears—

1. From the statutes above quoted.

2. From the language of the Madden affidavit, which states—

> "that said lands are vacant, unappropriated and are not interdicted mineral or reserved lands" (Appellant's Principal Brief, pp. 405-6; Certificate, fol. 2).

3. From the decision of the Commissioner expressly excluding all such lands (Bill, Sec. 14).

4. From the language of the patent which the Railroad received, accepted and recorded, providing—

> "Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid" (Appellant's Principal Brief, p. 418; Certificate, fol. 2).

POINT III.

As a matter of fact it now appears that portions of the land included in the 440,900 acres described in the Patent, are mineral lands of great value and that this was known to the Railroad long prior to its application for and receipt of the Patent in question.

See Bill, Secs. 5, 10, 11, 12, 16, 18, 20;
Certificate, fols. 2 and 3.

As this case is in the nature of a test case, it may not perhaps be improper to observe outside of the record, that approximately 45,000 acres of the lands described in the patent are mineral lands, and that these lands are of indefinite but certainly very great value, but only as mineral and not as agricultural land, estimates of this value by responsible persons running as high as $250,000,000.

To the extent that these lands have been located by mineral locators occupying positions similar to that of this appellant, the interests of these locators are involved in the present appeal, and to the extent that the lands remain unlocated, the interests of the United States are involved.

POINT IV.

The Railroad and the Kern Trading Company, the principal appellees in this case, appear, therefore, before this Court claiming to be entitled to property of great value which Congress expressly stated that it did not intend to grant and which it expressly appears that the grantee knew that it had no right to acquire.

Bill, Sec. 12.

POINT V.

It is respectfully submitted that the moral strength of the appellant's position, endeavoring, as he is, to stand upon the exact intent of the original grant, is so great that it cannot be overcome by any technical reasons advanced by those who claim in hostility to such intent, unless these reasons be of such overwhelming force as to be able to withstand the strictest scrutiny and test.

We ask the Court to keep in mind, in the consideration of this appeal, the following especial points:

1. No rights or interests of innocent third parties are involved.

2. There is no claim of change of position on the part of the appellees themselves of such a nature that an adverse decision would work injustice to them.

3. The situation is not embarrassed by any consideration of the effect of possession, occupancy or improvement of the lands in question which, as admitted by the demurrer, have always been and are wild, remote and unoccupied up to the time of relocation.

4. The granting statutes are carefully framed so as to avoid any injustice to the grantee if any lands described in the patent be excluded as being mineral lands, there being provisions giving the grantee the right to substitute equivalent agricultural lands in lieu of such mineral lands. These provisions are to-day in full force and effect *and ample lands are available for these purposes.*

POINT VI.

Upon seeking for the ground upon which the appellees base their claim to retain the benefits of lands which the United States never intended to grant and which the grantee knew it had no right to receive, we find this claim to rest not upon the Congressional grants, but upon the fact of the issuance of the Patent of July 10th, 1894, describing the lands in question.

Briefly, the argument of the appellees is—

1. That, although the grant was limited to non-mineral lands, yet the Land Department had juris-

diction to ascertain in the case of each tract whether or not the lands were non-mineral.

2. That, although the patent does not contain a recital of a decision to the effect that the lands were non-mineral lands, and although the patent expressly excludes and excepts all mineral lands, should any such be found in the tracts aforesaid, yet that the mere issuance of the patent raises the conclusive presumption that the Land Department must have examined and investigated the lands and ascertained that they were non-mineral lands and, therefore, were within its power to patent to the Railroad Company pursuant to the Congressional enactments.

In other words, the appellees' case must stand or fall, not upon *proof* that the Land Department adjudicated these lands in their favor, but upon a *presumption* of such adjudication, which presumption itself is in direct violation not only of the facts themselves but of the express language of the patent upon which the appellees' rights depend.

To analyze this situation still further, the appellees' rights must necessarily flow—

First. *Not from the grant,* which is absolutely hostile to their contention.

Second. *Not from the patent,* for this instrument not only does not support their position, but upon its face is conclusive against their claim; but

Third. From alleged presumptions from the mere fact of execution of the latter instrument, which presumptions are directly contrary to the facts in the case, are annihilative of the expressed intent of Congress, and are diametrically opposed to the language of the instrument itself.

Let us now proceed to consider the situation more in detail.

POINT VII.

An analysis of the nature of a land patent.

We desire to point out—

A. A patent partakes to some extent of the characteristics both of a deed and of the record evidence of a judgment.

B. The act of issuing it is a ministerial act.
Wurts v. *Hordy*, 178 U. S., at p. 212.
Stoddard v. *Chambers*, 2 How., 317.

C. The patent should issue as the result of a judgment of the Land Department.
Steel v. *Smelting Co.*, 106 U. S., 447.

It has been called the record evidence of the judgment of the Land Department.
U. S. v. *Winona*, 67 Fed. Rep., 956.

D. The power of the Land Department to issue a patent must be based upon statute.

E. As a matter of fact we believe that under the language of the grant and the joint resolution the patent in this case should be considered merely as a confirmation of the grant. If so considered no argument is necessary to show that it cannot operate to enlarge the provisions of the grant, which, of course, does not give the railroad any title to mineral lands.

Let us examine separately the effect of the patent in question considered, first, as a conveyance, and secondly, as the record of a judgment of the Land Department.

POINT VIII.

If the Patent be considered simply as a conveyance of title,—or, more accurately, as a confirmation or record of the title passed by the Congressional grants,—it is impossible for the appellees to claim that any title to mineral lands passed thereby.

Deeds and grants containing reservations of this nature between private individuals are matters of every day occurrence, and in all such cases it is clearly established that no title passes to lands or rights expressly excepted and excluded from what would otherwise be the operation of the conveyance.

> "The effect of an exception in a grant in respect to the thing excepted is as though it had never been included in the deed."
>
> *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S., 586 at p. 604.

See other cases cited p. 283 of our principal brief.

This doctrine was expressly recognized as applicable to railway land grants in *Barden* v. *The Northern Pacific Railroad Company*, (154 U. S., 288) in which the Court said:

> "Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein, and yet the reverse is the experience of every day. The granting of lands, *either by the Government or individuals*, with a reservation of certain quarries therein, as of marble, or granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time

> by the grantee, in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the Government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed. And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any several products thereof, whether minerals or quarries contained therein, and whether known or unknown." (p. 314).

Title to reserved lands did not pass (p. 315).

The grant must be construed in favor of the Government (*id.*, p. 325).

Soderburg v. *R. R.*, 188 U. S., 526.

Moreover, the burden lies upon the appellees to affirmatively show that any parcel of land claimed by them under the patent was not within the exception.

> "There is a general rule applicable both to the conveyances and statutes that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must, in pleading, state the general clause together with the exception, *and must also show by the testimony that he is not within the exception.*"
>
> *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S., 604.

So, far therefore, as the effect of the patent, considered as a conveyance or confirmation of grant, is concerned, it is submitted to be entirely clear—

(*a*) That the United States had full and perfect power to except mineral lands from the original grant, *and that this was done;*

(*b*) That the patent, considered as a confirmation, *could not* have exceeded the authority conferred by the grant,

M. K. & P. R. R. v. *K. P. R. R.*, 97 U. S., 491,
R. R. v. *Baldwin*, 103 U. S., 426,

irrespective of the time when the title granted became vested in the grantee, and that the patent *did not* even purport to do so;

(*c*) That the exception in the grant and in the confirmatory patent operated to prevent the grantee from acquiring title to any mineral lands included in the general tract;

(*d*) That this is true whether or not either the grantor or grantee knew at the time the location or extent of the mineral lands in question;

(*e*) That the attempt to draw a distinction between exceptions of *minerals*, on the one hand, and *mineral lands*, on the other, is futile and baseless.

(*f*) *That the burden lies upon the grantee when its title is attacked to show that these lands were not within the excepted class.*

(*g*) That the grantee, having accepted the grant containing this exception, is, of course, absolutely bound and estopped by it—that is to say, unless it can advance some theory superior to the rules governing real estate grants and conveyances, in support of its claim. Such a theory is supposed to exist, based upon the idea that the patent is the record of a judgment of the Land Department—and this theory we will now consider.

POINT IX.

If the Patent be considered as in the nature of a record of judgment, it is likewise inoperative to give to the appellees any greater rights than those intended to pass by the terms of the Congressional grant.

The arguments of the appellees upon this branch of the case are:

(A) That Congress vested the Land Department with the power and duty to determine, once and for all time, whether any lands described were mineral.

(B) That it must be conclusively presumed from the fact that a patent was issued that the Land Department had adjudged all of the lands contained within the four hundred and forty thousand odd acres to be non-mineral lands. In other words, that the patent presumes both jurisdiction and the due exercise thereof. Their position tacitly, if not expressly, admits that their salvation depends, *not upon the patent,* but upon presumptions supposed to arise from the issuance of the patent that certain things had been done before the patent issued.

(C) That this is true, notwithstanding the express exception of "all mineral lands."

(D) That the exception last quoted must be considered superfluous and beyond the power of the Land Department to insert, leaving in full force the alleged conclusive presumption first above mentioned.

(E) That the appellant is endeavoring to maintain a collateral attack upon the patent, and that for reasons claimed to be applicable to judgments such a collateral attack is prohibited.

In considering this argument we will inquire—

I. Whether the Land Department was vested with any jurisdiction over these lands?

II. Whether any collateral attack whatsoever upon the patent is involved in this suit?

III. If the patent be considered to be in the nature of a judgment of the Land Department, is that judgment the judgment of a tribunal of general or of special jurisdiction?

IV. Considered as a judgment of a court of special jurisdiction, is it entitled to the benefit of any presumptions whatsoever which will protect it against collateral attack—if this action be construed as a collateral attack?

V. If considered as a judgment of a tribunal of general jurisdiction, is it protected against collateral attack—if this be collateral attack?

We will take up these various points separately.

I. *It is, to say the least, doubtful whether Congress ever vested in the Land Department any jurisdiction to ascertain the quality of these lands as mineral or non-mineral.*

Under the language of the *Barden* opinion, such jurisdiction *was* conferred. See also *Lake Super. Canal Co.* v. *Cunningham*, 155 U. S., 375; *Toltec Ranch Co.* v. *Cook*, 191 U. S., 541.

It is, however, argued with much force in the brief presented in this Court by counsel for the appellant Lamprecht, that this part of the *Barden*

opinion should be regarded as a dictum,—that the Congressional grants made the issue of a patent mandatory upon the completion of each section of road and receipt of the Commissioners' report thereon (§ 4)—that the decisions relating to patents issued under *general laws* have no application to this particular act, inasmuch as a patent in this case was merely confirmatory of a *title already passed* (except as to reserved lands), whereas under general laws no title would pass without a patent—that no provision was made in this statute for any investigation by the Land Department concerning the nature of the lands—and that it was expressly contemplated that the exception of mineral lands should be protected, not by any decision of the Department but by an express clause of the patent, as was actually done.

This point has been presented by counsel so fully that it will only be enumerated here for completeness' sake. Moreover, in our view of the case *the patent was certainly inoperative* as to these lands for reasons we shall shortly give, *whether or not Congress intended that the Land Department should have anything to do with the ascertainment of the non-mineral quality* of lands to be included in the patent.

We cannot, however, refrain from observing that the existence of this *doubt* as to the very jurisdiction itself of the Department should in our opinion *be taken as emphasizing the danger of lightly relying upon any presumption or assumption* that a jurisdiction which the Department itself, in the express language of the patent, shows that it did not even assume or purport to exercise, was as a matter of fact, exercised by it with a result annihilative of its own express declaration, and absolutely subversive of the clear intent of the Congressional enactments upon which the entire matter depends.

II. *The present action does not involve any collateral attack (within the proper meaning of the term) upon the patent in question.*

It is true that the lands claimed by us were included among the lands described in the patents.

It is true that these lands were known mineral lands at the time the patent was granted.

It is true that the Land Department had no jurisdiction, as we shall shortly show, to issue a patent even purporting to cover known mineral lands.

But it is also true that the Land Department *did not attempt to assert that any of the lands described were non-mineral lands, but expressly excluded and excepted "all mineral lands,"* which term this Court in the Barden case has construed to cover both known and unknown lands.

Hence, instead of attacking the patent collaterally either as referring to known or unknown mineral lands, we are simply asserting that it should be construed as an entirety in the light not merely of a part, but of the whole, of its provisions, and that, as thus construed, it affirmatively shows that it was never the intention of the Department to attempt to convey the title to any mineral lands, whether known or unknown at the time the patent was issued.

The question is, perhaps, somewhat confused by the use of the words "void" and "voidable." The exact word descriptive of the relation that this patent bears to these lands is *"inoperative."* The effect of the exception as applied to lands described, is, that if they were in fact, mineral, *the title to them never passed* at all. It is as though they had been omitted originally from the instrument (Point VIII, *supra*). In other words, if a deed conveys to me the Manor of Dale, it should not perhaps be called *"void"* with reference to its effect upon the title to the Fief of Fairlie—it simply is

ineffective according to its own terms. And so, in the present case.

As pointed out in our principal brief, so far as this patent is attacked at all, such attack is being made not by the appellants, but by the appellees, who seek to disregard one of its most material provisions and thereby to give the instrument an effect which is the diametrical opposite of that which it was intended to possess.

III. *If the patent be considered as evidence of a judgment, such judgment was rendered by a Court of special and limited, and not of general jurisdiction.*

> "Its judgment (the judgment of the Land Department) upon these matters is that of a *special tribunal.*"
>
> *Steel* v. *Smelting Company,* 106 U. S., at p. 450.
>
> *Smelting Co.* v. *Kemp,* 104 U. S., 641.

See

> *Barden* v. *Northern Pacific R. R.,* 154 U. S., at p. 328.
>
> Black on Judgments, Sec. 283, 11 Cyc., p. 772.
>
> Bailey on Jurisdiction, Sec. 124.
>
> XVII Am. & Eng. Cyc. Law, 1084.

IV. *The Land Department being, therefore, a tribunal of special jurisdiction (if, indeed, it possessed any jurisdiction at all in the premises), the patent, if considered as the record evidence of its judgment, must comply with the universal rule governing the records of such special and limited tribunals and must (at least unless extrinsic evidence of jurisdiction be produced) affirmatively show upon its face the facts necessary to give the tribunal jurisdiction of the matter purporting to have been decided by it. No presumption of jurisdiction exists.*

The Court will notice that we are not now arguing the question as to whether *we* have the right to show that *no* jurisdiction existed.

On the contrary we assert that the *appellees*, claiming that the tribunal acted within its jurisdiction, *are bound*, in support of their claim, *to affirmatively show* upon the face of the record (or perhaps by extrinsic evidence) *that such jurisdiction existed.*

In support of this proposition we will only attempt to refer the Court to a few of the many authorities which exist.

> "The record of their proceedings must affirmatively show compliance with the statutory requirements, and that as to such matters favorable presumptions will not be indulged in."
>
> Bailey on Jurisdiction, Sec. 124 (?9)

> "This presumption is not exercised in relation to the jurisdiction of a Court inferior or limited, but its jurisdiction must appear or be shown."
>
> Bailey on Jurisdiction, Sec. 121, 130, 183.

> "Courts of inferior or limited powers must not only act within the scope of their jurisdiction, *but it must appear on the face of the proceeding that they so acted;* the record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular case, otherwise the judgment may be impeached collaterally. No presumptions are indulged in its support and want of jurisdiction may be shown *aliunde.*"
>
> *Black on Judgments,* Sec. 282.

> "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments

of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. * * * *The rule is different with respect to courts of special and limited authority;* as to them there is no presumption of law in favor of their jurisdiction; that must *affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face."*

Galpin v. *Page,* 18 Wall., U. S., 350.
Kempe v. *Kennedy,* 5 Cranch, 173.
Thatcher v. *Powell,* 6 Wheat., 119.
Walker v. *Turner,* 9 Wh., 541.
Copley v. *Ball,* 176 Fed. Rep., 689.
I Black, Judgments, 431-434.
Grignon v. *Astor,* 2 How., 319.
XVII Am. & Eng. Enc. Law, 1082, Appellants' pr. brief, p. 303, and cases.

This rule appiies even to a court of general jurisdiction, acting under special and limited power.

"Where the special powers conferred (*i. e.,* upon the Court), are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. *The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."*

Galpin v. *Page* (*supra*).

See

Seccombe v. *R. R.,* 23 Wall., 108.

Judgments of courts of special jurisdiction are absolute nullities if want of jurisdiction in fact exists.

Bailey on Jurisdiction, § 173.

Many authorities declare that unless jurisdiction affirmatively appears from the face of the record, it cannot be shown by extrinsic evidence. In this case it is not made to appear in either manner. *Moreover if it were attempted to show by extrinsic evidence that the Department had actually determined that the lands were non-mineral, such evidence would contradict the express language of the mineral exception in the record and could not be admitted.*

The general rules above quoted are directly applicable to Land Department patents, considered as records of judgments given by the Land Department.

a. The Land Department never has had any jurisdiction to make grants "in defiance of the will of Congress" of lands which have been expressly reserved by Congress for other purposes. *Any such attempt is void and inoperative.*

Burfenning v. *R. R.*, 163 U. S., 319.
Black on Judgments;
Johnson v. *Drew*, 171 U. S., 100.
Smelting Co. v. *Kemp*, 104 U. S., 636.
Steel v. *Smelting Co.*, 106 U. S., 447.
Doolan v. *Carr*, 125 U. S., 618.
Reynolds v. *Iron Silver Mining Co.*, 116 U. S., 687.
Northern Pacific R. R. v. *Sanders*, 166 U. S., 620; 171 U. S., 655.
Wright v. *Roseberry*, 121 U. S., 519.

b. The Land Department cannot arbitrarily abrogate the rights of an entryman.

Parsons v. *Venzke,* 168 U. S., 589.
Bank v. *Bladow,* 176 U. S., 453.
Hawley v. *Diller,* 178 U. S., 476.

c. Under this grant it had no jurisdiction to grant mineral lands, whether known or unknown, entered or not, for these were expressly reserved by Congress from the original grant.

Barden v. *Northern Pacific R. R.,* 154 U. S., 288.
U. S. v. *C. P. R. R.,* 84 Fed. Rep., 218.

See

Northern Pacific R. R. v. *Sanders,* 166 U. S., 620.

d. In the present case, the jurisdiction of the Land Department (if it existed at all) was strictly limited by the Joint Resolution of 1870, which provided that—

> "it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company for the sections of land coterminus to each constructed section reported on as aforesaid to the extent and amount granted to said Company by the said act of July 27th, 1866, *expressly saving and reserving* all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866" (Bill of Complaint, Sec. 8).

The conditions and restrictions referred to have reference to lands of which—

> "the United States have full title not reserved, sold, granted or other appropriated and free from preemption or other claims or rights * * * provided further that all mineral lands be and the same are hereby

excluded from the operations of this act" (Bill of Complaint, Sec. 6).

e. Of course, if the Land Department had power to classify these lands, it could decide *pursuant to due proceedings,* whether in any given case a parcel of unknown land fell within the class covered by the foreging exceptions; and similarly, *pursuant to due proceedings,* it might authorize the passing of title to unknown land which really was mineral but which had been erroneously decided after an investigation and hearing, to be non-mineral.

For inferior courts whose jurisdiction depends on the existence of certain facts may sometimes by adjudicating the existence of these facts thus acquire jurisdiction that would not otherwise exist.

Bailey on Jurisdiction, § 129-130.
Smelting Co. v. *Kemp.,* 104 U. S., 641.
Kent v. *Canal Co.,* 144 U. S., 75.
Phelps v. *Mutual Ex.,* 112 Fed. Rep., 45.

f. But the point which we wish to make clear is that the only basis upon which IN ANY POSSIBLE EVENT it can be claimed that the Land Department had or acquired jurisdiction to transfer a title to land which, as a matter of fact, was not within its primary power to transfer, is the basis of an actual decision rendered after due proceedings by the Land Department to the effect that the land in question was non-mineral land. Even this basis would not justify a patent of known mineral land.

If it appears *upon the face of the record* that such a decision has been made pursuant to proceedings duly had, then, unless attacked directly for fraud or otherwise, it might (except as suggested in Subd. I of this Point) be binding against the world and be a sufficient proof of the jurisdiction of the Department to execute a patent upon such land.

And perhaps (which we do not concede) if it can be shown affirmatively by evidence *outside of the record, and which does not contradict the record*, that such due proceedings leading up to such a decision were had, the result might be the same.

But where (1) there is no such decision upon the face of the record, and where (2) there is no evidence of any such proceedings or decision outside of the record, and where (3) there is in no possible event any jurisdiction on the part of the tribunal to act in the absence of such a proceeding or decision, we submit that it is entirely clear that the patent, itself purporting to transfer title to certain lands without classifying them as non-mineral lands, without deciding that they are non-mineral lands, without reciting that proceedings had been taken to determine whether or not they were non-mineral lands, whose only recitals do not even touch the point, and, lastly, containing upon its face the express reservation of *"all mineral lands"—thus showing affirmatively that no such decision had ever been rendered*—cannot possibly give rise to any presumptions of a jurisdiction which not only was not affirmatively shown, but, on the contrary, which was affirmatively shown not to have been claimed to exist; and that the patent itself is a nullity so far as it may be claimed to be the basis of a title to lands which the Department primarily had no power to grant and which it could only obtain power to grant, if ever, by a decision that, as a matter of fact, they were non-mineral lands.

The position of the appellees is based upon grounds which are *exactly the opposite* of those established by the authorities. They claim that we must show an affirmative decision that the lands were mineral in order to rebut an alleged presumption to the contrary. But the authorities make it clear, we submit, that, whether the patent be considered as a deed or as the record of a judg-

ment, *the burden is upon the appellees to affirmatively show* that the lands were decided to be non-mineral in quality. This burden they cannot sustain.

g. Let us examine in this connection the language of the decisions of this Court as to what a patent must contain (Appellant's Pr. Brief, p. 315).

Upon so doing it will be found that the Court has made clear the necessity that the patent itself show the existence of the jurisdictional facts.

> "The fact remains that under the law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title of the Government to the grantees,* reposes in officers of the Land Department. Until such patent is issued, *defining the character of the land granted and showing that it is non-mineral,* it will not comply with the Act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral land; but a patent *issued in proper form upon a judgment rendered* after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, *that the lands were non-mineral,* would * * * be conclusive."
>
> *Barden* v. *The Northern Pacific Co.,* 154 U. S., at p. 330 *et seq.*

See

> *Davis* v. *Weibbold,* 139 U. S., 526.
>
> *Deffebach* v. *Hawke,* 115 U. S., 406.

> "It can issue to the rightful claimant the patent provided by law, *specifying that the lands are of the character for which a patent is authorized.*"
>
> *Barden* v. *N. P. R. R.,* p. 327.

IN OTHER WORDS, THIS COURT HAS APPLIED TO PATENTS THE GENERAL PRINCIPLES ABOVE INVOKED.

Not only must there be a decision, but it must appear that the decision has been made pursuant to due proceedings. In other words—

> "*after a due examination* of the subject by officers of the Land Department."
>
> *Barden* v. *Northern Pacific Co.*, p. 331.

And it must be expressly noted that the due examination to which the Court alludes does not mean that the duties of the land officers can be performed by the mere acceptance of selections made by the claimant or of the listing of such selections.

> "The Act of Congress does not provide that the selections of the lands by the plaintiff, as a part of its grant, shall in any respect change its purport and effect and eliminate any of its reservations; nor does it empower the officers of the local land office to accept the list as conclusive with respect to such grant in any particular."
>
> *Id.*, p. 321.

It should be noted here, that whatever the amount or nature of the testimony that may be taken, *there must in any event, be a decision.* No possible preliminary proceedings can validate the patent as to these lands, *if they were not in fact decided to be non-mineral.*

h. If, as is the case, the foregoing rules apply in any case where patents are issued, how much more strictly should they apply in the present case where the limitations of any jurisdiction that may be held to exist were emphasized by the terms of the joint resolution of 1870 stating that—

> "it shall be the duty of the said Secretary of the Interior to cause patents to be issued

> * * * *expressly saving and reserving* all the rights of actual settlers together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866" (Bill of Complaint, Sec. 8).

It may be well contended that the foregoing language constitutes a direction to the Secretary of the Interior to *insert in the patent* to the grantee an express reservation of these various points, including the mineral exception. *This was the only way to assure perfect protection to the U. S. provided the grantee was willing to accept the patent in that form.*

But whether or not it should be thus construed, one thing is submitted by us to be certain, and that is *that if the Land Department* had any jurisdiction to ascertain the quality of the lands, it was *certainly made its duty to protect these reservations EITHER by the language of the patent OR by a proper proceeding, investigation and determination.*

And where the patent, as in the case at bar, fails to show upon its face that any steps whatsoever (other than the mere listing of the lands, Appellant's Pr. Brief, p. 417), have been taken by the Land Department or the claimant to comply with the mandatory provisions of the joint resolution and with the general limitations of the original grant, and where no extrinsic evidence is produced showing such compliance, we feel entirely safe in submitting that no presumptions whatsoever can be resorted to to give the patent a force which it would not otherwise possess.

No classification of the lands as non-mineral appears in the patent.

Had such a classification appeared, based simply upon the recitals, the latter would have been absolutely insufficient to support the classification. They refer solely to the construction of the road,

the listing of the lands, and their location as coterminous with the road, and are absolutely silent as to any steps taken to determine their non-mineral quality. Hence such an attempted decision or classification being based upon insufficient evidence would be always attackable (Cases *infra*). No other evidence than as recited will be presumed to have been taken.

Galpin v. *Page,* 18 Wall, 350, and cases cited Subd. V. of this point.

And the express language of the mineral exception in the patent, so frequently hereinbefore quoted—

> "yet excluding and excepting *all mineral lands* should any such be found in the tracts aforesaid"

places the question, it is submitted, at rest and affirmatively demonstrates the non existence of any of the proceedings or of the vital decision which the appellees claim must, from the mere issuance of the patent, be presumed to exist, and the necessity for which was emphasized by the language of the joint resolution above quoted.

To summarize:

(*j*) The jurisdiction of the Land Department (if it possessed any jurisdiction at all in this case) to grant as non-mineral, lands which in fact were mineral, is in any event subject to the following principles:

(1) If the lands were known to be mineral, no decision that they were not mineral could possibly affect the situation. The very word "known" assumes a situation which the Land Department could not overturn by a decision to the contrary.

U. S. v. *C. P. R. R.,* 84 Fed. Rep., 218.

The lands were *restricted* from grant (*Smelting Co.* v. *Kemp,* 104 U. S., 671). If such a decision were attempted, we believe that it would simply be a decision of law upon insufficient evidence, and as such always subject to attack.

N. P. R. R. v. *Colburn*, 164 U. S., 385;
Hawley v. *Diller,* 178 U. S., 489;
Appellant's principal brief, p. 16 *et seq.*

(2) In the case of lands not known to be mineral, but which in fact were mineral, the Department had power to investigate and take testimony upon due notice to all previous locators and upon compliance with the reasonable rules of the Department. If after such proceedings they did reach a decision that the lands were in fact non-mineral and if those proceedings and that decision were recited in the patent, it might be conclusive. *Certainly no less than this is imperative in the case of known mineral lands.*

(3) But no such decision could be made arbitrarily and without notice to prior entrymen, whose rights could not be arbitrarily cancelled.

(Cases *supra*).

(4) Nor would such a decision be valid as giving jurisdiction unless the proceedings were had in accordance with the established rules of the Department as to notice and investigation and unless these rules were reasonable, appropriate and within the law.

XXVI Am. & Eng. Enc. Law, p. 379.
See *Leonard* v. *Lennox,* 101 Fed. Rep., 764.
Appellant's Pr. Br., p. 301.
Black on Judgments, § 530.
Puget Mill Co. v. *Brown,* 54 Fed. Rep., 987; affd. 59 , 35.
32 Cyc., 1025.

Of these rules this Court takes judicial notice.

Caha v. *U. S.*, 152 U. S., 211.

Leonard *v.* Lennox, 101 Fed. Rep., 764.

They were not followed in this case (Appellant Pr. Brief, pp. 97, 160, 286-8).

(5) Such decision (as well as the taking of due and proper proceedings) should have been set forth in the record itself, to wit: in the patent.

Barden v. *The Northern Pacific R. R.*, 154 U. S., p. 288.

(6) As these record requirements were not complied with, and as no extrinsic evidence of such compliance was produced, there is absolutely no proof or presumption that the Land Department had or acquired jurisdiction to convey, in hostility to and defiance of the Congressional enactment, lands which are, in fact, mineral.

V. *If the patent be considered as the record of a judgment of a tribunal of general jurisdiction, is it protected against collateral attack—if this action be a collateral attack?*

Needless to say we intend to consider this point without in any way waiving the propositions above advanced.

(*a*) We do not need to consider the mass of authorities relating to presumptions of jurisdiction of tribunals of general powers or to collateral attacks upon ordinary judgments of such tribunals, although we take it that in any case we may attack such a judgment for lack of jurisdiction.

Williamson v. *Berry*, 8 How., 540.

Old Wayne Assn. v. *McDonough*, 204 U. S., 16.

(*b*) For in this case the lack of jurisdiction *appears affirmatively* upon the face of the so-called judgment itself.

(*c*) *If* the Land Department were a tribunal of general jurisdiction and *if* this patent had contained no mineral exception, it might possibly be claimed to be conclusive against all the world. This point we do not concede, and shall not argue. But in this case, the mineral exception appearing as it does upon the very face of the record shows that the Land Office never intended to convey mineral lands and never even purported to have decided that the lands described were not mineral lands.

(*d*) And since, as we have already shown, the only way (if any) in which the Department could acquire jurisdiction to convey as non-mineral, lands which really were mineral, was by an actual decision, after due proceedings had, that the lands were non-mineral, it follows that where it affirmatively appears upon the record that no such decision was rendered, any possible presumption which otherwise might exist is negatived.

(*e*) In other words, whether or not the judgment might have been considered *res adjudicata* against collateral attack upon this point if the record had been silent, yet where the record affirmatively discloses that this point—*the essential point relating to jurisdiction*—had not only not been decided but had been expressly reserved from decision, all presumptions fall.

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts *concerning which the record is silent.* Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consider-

ation when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it * * * will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

Galpin v. *Page,* 18 Wall., 350.

See also *Settlemier* v. *Sullivan,* 97 U. S., 444.

Butterfield v. *Miller,* 195 Fed. Rep., 203.

Ritchie v. *Sayres,* 100 Fed., 520.

Guaranty Trust Co. v. *Green Cove Co.,* 139 U. S., 137.

Bailey on Jurisdiction, § 137.

See cases cited in Appellant's Principal Brief, pp. 72 to 101, and p. 59.

"Where a judgment or decree expressly excepts or reserves from its operation specified rights or claims of the parties in suit or the decision of questions in issue, or the right to take further proceedings in respect to certain matters, it constitutes no bar to a subsequent action on the matters so reserved; but on the contrary the reservation itself becomes *res adjudicata* and prevents the raising of any question as to the right to bring or maintain such subsequent suit."

23 Cyc., page 1145.

"The notice and return, appearing of record in the proceedings for divorce, control the general recital in the decree that due service had been made upon the defendant therein."

Cheely v. *Clayton,* 110 U. S., 701.

"When a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption (i.

e., of jurisdiction) cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting".

Old Wayne Life Assn. v. *McDonough*, 204 U. S., 16.

"Counsel invoke the presumption in favor of the regularity of the proceedings of a court of general jurisdiction which protects its decrees against collateral attack where its record is silent regarding alleged defects, but there is no room for presumptions where the crucial facts appear upon the face of the record, and this presumption does not arise where the record itself discloses a fatal lack of jurisdiction. * * * The decree * * is therefore void on its face, both against direct and against collateral attack, and it must be disregarded."

Indiana Lumber etc. Co. v. *Brinkley*, 164 Fed. Rep., 968, and cases cited.

Kempe v. *Kennedy*, 5 Cranch. 185 (Marshall, *C. J.*)

"If the judgment itself does not show what matters were litigated and decided, the fact may be shown from other parts of the record or by competent evidence, although the estoppel cannot be extended to matters which the judgment expressly declares not to have been in issue in the action in which it was rendered, *or to have been omitted from consideration therein.*"

23 Cyc., page 1292.

The foregoing proposition is submitted to be true whether the judgment be taken as a judgment *in personam* or a judgment *in rem* or a judgment *quasi in rem*. In no case can it be said to be in any way a binding decision as to a point which it expressly shows upon its face that it did not decide.

And since the absence of decision of this point rendered the patent nugatory as to lands in fact

mineral, it follows that it was a wholly inoperative instrument to transfer title to such lands.

In other words, the patent does not protect the appellees either expressly or by presumption, and this whether it be considered as a deed or as the record of a judgment.

Merely because a so-called patent has been signed, sealed and delivered, it cannot be said to possess any peculiar sanctity. It may be a valid instrument—it may be worthless. Of two patents issued to different grantees for the same parcel of land, as sometimes happens, one is worthless, though both are executed with the same formalities. In every case, its value depends upon the attending facts and circumstances either as set forth in the instrument itself or as shown *aliunde*. *In no case*—even under the construction most favorable to the patentee—*can such an instrument be given greater force and effect than would be possessed by the judgment of any tribunal of special and limited jurisdiction.* And yet the contention of the appellees would place it upon a unique pedestal of prestige and authority—superior to the most formal and careful conveyance—outranking the most solemn judgments of courts of widest jurisdiction.

For such a contention, and especially with such results as would follow its adoption in this case, it is submitted that neither reason, expediency, sound morals nor authority furnish adequate support.

Having thus reviewed the legal situation in detail, we sum up the relations between the parties, in their wider bearings, thus:

(*a*) The title to the mineral lands remained in the United States.

(*b*) Appellant and others have made mineral locations on these mineral lands, as permitted by Federal and local law.

(*c*) The Railroad has good title to the non-mineral lands, and no title whatever to the mineral lands.

(*d*) The mineral locators thus are neither intruders nor trespassers, but are entitled to their mineral claims lawfully and in good conscience.

(*e*) The Railroad's endeavor, in spite of the Act, the Joint Resolution and the clear exception in the patent, to take unto itself these mineral lands is dishonorable, immoral and conscienceless.

POINT X.

In opposition to the foregoing considerations the appellees place great stress upon the claims that the mineral exception in the patent was absolutely void and inoperative, that the Land Department had no power whatever to insert it in the patent in question, and that in any event the exception does not indicate a failure on the part of the Department to decide upon the quality of the lands.

Their entire argument is contained in Judge Ross's opinion in the Roberts case (a case in which the bill alleged expressly that title to the lands had passed to the patentee), in which he held that the decision in *Shaw* vs. *Kellogg*, 170 U. S., 313, was a direct authority for the proposition that the officers

of the Land Department had no authority to insert in the patent under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid."

In addition to *Shaw* vs. *Kellogg*, special reliance is placed upon *Cowell* vs. *Lammers*, decided by Judge Sawyer in 21 Fed. Rep.. 200; *Francœur* vs. *Newhouse*, 40 Fed. Rep., 621, and a ruling by Secretary Hitchcock, 32 L. D., 342, etc. All of these decisions are considered at length in our principal prief (p. 147 *et seq.*). It is not our intention to repeat these arguments in detail, but we desire to summarize them as follows:

A. As to *Cowell* vs. *Lammers*, and *Francœur* vs. *Newhouse*, they were both decided at Circuit and by the same judge.

Both were based upon the theory that the railroad land grants covered all lands except mineral lands that were *known to be such at the time of the grant.* Upon this theory the Court appears to have held that a broad exception of all mineral lands would limit the grant, by attempting to reserve not merely known lands but unknown lands as well. Incidentally the rights of these parties were involved.

This fundamental theory upon which the decision depends was annihilated in the case of *Barden* vs. *The Northern Pacific R. R.*, 154 U. S., page 288 *et seq.*, in which this Court settled for all time the proposition that railroad land grants excepted both *known and unknown* mineral lands.

Hence the reservation contained in the mineral exception *did not limit the grant* but carried it into effect, and the entire reason for the earlier decisions failed.

B. As to the ruling of Secretary Hitchcock in 1904, we call attention to the fact, (1) that for thirty-seven years prior to that time it had been the uniform practice of the Department to insert the mineral exception; (2) that this was changed by an

ex parte ruling of the Secretary upon an application made by the Northern Pacific Railroad Company; (3) that this ruling was itself overruled in 1911 and that from that time until the present day the uniform practice of the Department is as it was formerly, to insert the mineral exception. Hence this department ruling has been itself overruled. This practical construction of the law by the Land Office is entitled to much weight (Appellant's Pr. Brief, p. 397).

C. *Shaw* vs. *Kellogg, supra*, is, we submit, manifestly inapplicable to the present case for the following reasons:

(1) The statute expressly directed the Surveyor General of New Mexico to make survey and location of the land selected, " thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select " (p. 342).

(2) No provision for lieu lands was made.

(3) The grant was so framed that if any part of the lands were mineral, the title to the entire selections would fall.

(4) The grantees' selection was actually approved by the Surveyor General (p. 342).

(5) The Land Department approved the action of the Surveyor General (p. 343).

(6) Hence there existed in that case the great element which does not exist in this case, to wit: an *actual decision* of the Land Department to the effect that the lands were non-mineral.

(7) The case arose under what was known as the Baca Grant, which was expressly construed by the Court as only excluding lands " which were then *known* to contain mineral " and which allowed a limited time to make the selection (p. 332). This is exactly the opposite of the situation in the grant now

under construction, which has been construed to exclude both known and unknown mineral lands.

(8) In the next place the grant in question did not require or permit a patent to be issued. Title passed at the time of the "approved survey and location" (p. 382). No instrument was therefore executed and delivered to the grantee *and accepted and recorded by him*. In other words, *no question of estoppel arose*.

(9) Lastly, title having passed to the grantee, pursuant to a *valid decision* of the Land Department that the grantee was entitled to the lands in question, it was of course manifestly impossible for a subsequent locator, for the first time, to raise the question thirty-four years thereafter, and his claim that the Burden case applied was, of course, fully met by the fact that in the Burden case a patent was required, whereas in the Shaw case no patent was permitted.

The appellees urge most vigorously that the Shaw case establishes the proposition that "it was its (i. e. the Land Department's) duty to decide the question, a duty which it could not avoid or evade."

With this general proposition we have no quarrel. This language, however, must be read in connection with the express finding of the Court *that there was a decision* by the Surveyor General "that the land was non-mineral" (p. 337), and that this decision was accepted by the Land Department. In other words, the Department *did decide* the question in the Shaw case.

And although at the time the patent now in question was issued it was open to the Railroad Company to urge that the Department *ought to have decided* this particular question, to wit:—as to the quality of the lands purporting to be covered by the patent, yet, as a matter of fact, *they did not decide* that question. Whether or not they did their duty,

is now immaterial. *No decision was, as a matter of fact, rendered on this point.* Manifestly, affirmative proof *of no decision cannot be deemed equivalent to an actual favorable decision;* at best it can be only deemed equivalent to a refusal to take any action whatsoever on this point—and that is exactly what was done.

If the officers of the Land Department fail to do their duty, can this failure be relied upon by the appellees as a sufficient ground for taking away from the United States the title to this valuable property? The default, if any, on the part of the officers of the Land Department was known to the appellees. The patent, if it was in improper form and issued in the absence of the necessary decision, *was accepted by the appellees* in that form and with knowledge of the absence of this decision. The claim that under these circumstances the rights of the United States to this territory have been validly foreclosed is a claim which we believe to be against good conscience.

As against the authorities above discussed our principal brief shows:

(1) The uniform practice of the Land Department, except during the period above specified.

(2) The uniform current of the California and other State cases cited in our principal brief (p. 134 *et seq.*), and the language of this Court in such cases as *Reynolds* v. *Ir. S. Min. Co.* (116 U. S., 687), and *Moran* v. *Horsky* (178 U S., 211).

(3) The decision in the Barden case already fully considered, and never overruled (see p. 331), and the decision of Judge Bean in *East. Or. Land Co.* v. *Willow River, &c.*, reversed by the Circuit Court of Appeals on grounds stated in our Supplemental Brief, page 30.

(4) The fact that in the present case the exception did not limit the congressional grant but carried

it into effect, thus rendering *Davis* v. *Weibbold* and *Diffebuck* v. *Hawks* inapplicable.

(5) The fact that the Joint Resolution of 1870 expressly required that the restriction as to non-mineral lands and all other conditions and restrictions should be saved—which could only be done by express language in the patent or by a full examination of the facts and express adjudication as to the nature of the lands—which latter alternative was not adopted.

(6) The uniform current of the authorities upon the general subjects of the effect of the patent as a deed and as record of a judgment hereinbefore considered.

(7) The absence of any decision, either shown by the patent itself or by outside proof, which is in any degree inconsistent with the apparent intent of the Land Department to leave the question of the quality of the land open and unsettled. Had such a clearly inconsistent finding been made, it might have been held controlling, and the mineral exception repugnant. But in its absence, the actual intention of the Land Office not to make any such decision is made clear beyond peradventure by the language of the exception.

Whether or not the Department can validly insert the mineral exception in cases where actual decisions *contra* are rendered; *it certainly had power where no decision was rendered, to so state in the patent. And this is exactly what the mineral exception accomplishes in this case.*

(8) Lastly, the enormous strength of the moral position of the appellant, who is seeking, partly by reliance on the mineral exception, to carry into effect just what Congress intended to effect, as compared with the position of the appellees, who, repudiating the exception, are seeking to annihilate that intent, to their own unfair advantage.

We will briefly notice the point made in the appellant's brief to the effect that the mineral exception does not repel the alleged presumption of decision of the quality of the lands claimed to flow from the issue of the patent.

The point is submitted to be untenable.

In the first place, *no presumption flowed from the patent* as to the jurisdictional question of whether the lands were or were not determined to be non-mineral lands.

In the second place, if, under any circumstances, such an assumption would have existed in the absence of the mineral clause, it certainly cannot exist as against the force of the mineral exception.

The presumption, if it exists at all, is a presumption that the department had definitely decided that the lands were non-mineral lands; but if such a decision had been made by them after the investigation contemplated by the law, it is inconceivable that they would have immediately stultified their own judicial determination by a clause which left the entire question open for further consideration and determination.

If a Court, in adjudging a number of issues, expressly leaves for future determination the question whether A owes B $100, how absurd it would be to *assume that this Court had already actually decided this debt to be due.* Yet such is the claim of the appellees. But the words of futurity in the exception expressly repel any idea of action taken in the past.

POINT XI.

The effect of the acceptance and recording of the patent by the grantee.

This point has been fully considered in our principal brief (pp. 375 *et seq.*) and in our supplemental

brief, and has also been alluded to in the foregoing argument.

We desire, however, to now summarize our views upon this point as follows:

(1) The appellees could not have been compelled to accept the patent if, as a matter of fact, it was improper in form.

Leroy v. *Jamison*, 3 Sawyer, 369,—opinion of Fields, *J.*

United States v. *Schurz*, 102 U. S., 399.

Cowell v. *Colorado Springs Co.*, 106 U. S., 55.

(2) If tendered to them in an improper form they could have refused to take it and have insisted upon its correction, In other words, if the Land Department had any jurisdiction in the premises, the grantee could have amply protected itself against the possibility of attack by making due proof that the lands were non-mineral and by insisting that the Land Department should decide accordingly and should record its decision in the patent This proof they refused for two years to make, and hence were compelled to be satisfied with the only kind of patent which the Department, realizing its ignorance of the facts, and possibly in doubt as to having any jurisdiction, was willing to execute.

(3) By taking the patent as it was drawn, however, *in the form best fitted to absolutely protect the United States and to exactly comply with the terms of the grant*, the appellees affirmatively elected to accept it in its entirety and are absolutely estopped from claiming that so far as it is favorable to them it is valid, and so far as it is unfavorable it is void. The instrument must stand or fall as a whole, and all its parts must be read together, and the patentee is bound by the result of such reading.

(4) It is entirely immaterial so far as this is concerned whether or not the patent be considered as a deed or as the record of a judgment.

If the patent be considered to be taken as a deed, there can be no possible question as to the validity of the exception clause, for the reasons given in an earlier part of this brief. If the patent be considered as the record of a judgment, which no motion was made to correct and from which no appeal was taken, but under which the patentee has asserted rights, the same conclusion must follow. For it does not lie in the patentee's mouth to rely on the judgment in part and repudiate it when and as deemed convenient. A judgment, even if erroneous in fact is conclusive in its entirety until corrected. And if void at all it is void in *toto*.

(5) And emphatically is this true where, as in the present case, the patentee for years executed subconveyances to various purchasers, expressly recognizing the mineral exception and embodying it in the terms of its own grants (Appellant's principal brief, pp. 446-9).

(6) In this respect the case differs most emphatically from *Shaw* v. *Kellogg* (*supra*), where no patent was provided for, or issued to or accepted by the patentee.

(7) And if under any possible circumstance there could be any escape from the binding effect of the acceptance of the patent as hereinbefore indicated, it is submitted that no such exception exists in such a case as that disclosed by the certificate, which affirmatively shows that the exception was inserted "with the consent of the defendant Southern Pacific Railroad Company and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in

fact mineral" (Appellant's principal brief, p. 9). It is inconceivable that any theory of law or morals can be devised which can permit the arbitrary repudiation of such an agreement by one of the parties to it.

POINT XII.

As to privity.

(1) Unless our entire argument falls to the ground, it is not necessary for the appellant to show any privity whatsoever between himself and the original mineral locators of the land in question.

Either the title to these lands passed or it did not pass to the patentee.

If it passed, only subject to be avoided by fraud or mistake, &c., the appellant is out of court.

If it did not pass, it remained in the United States subject to such claims as the prior locators may have had, until the moment when the appellant relocated the lands in question, at which time he became the *cestui que trust* for whose benefit the United States held the legal title to these lands.

(2) Despite the foregoing observations, it is nevertheless submitted that if under any conception of the case it should be considered necessary to establish privity between the appellant and the prior locators, such privity exists for reasons which have been set forth at pages 317 *et seq.* of our principal brief.

The essence of the situation seems to us to be that the appellant is not attacking the patent in any way, shape or form, but on the contrary, is standing upon it as written and insisting that in accordance with its exact terms and intent no title ever passed from the United States to the patentee. If this be true, he, as mineral locator, stands in his own right in

a position where he can establish a better title thereto, than that which the appellees may claim. The time of his location is immaterial.

POINT XIII.

As to the Statute of Limitations.

For the reasons set forth in the preceding portions of this brief, no question of the Statute of Limitations can arise, because no attack is being made upon the patent, but it is simply sought, not to be cancelled in whole or in part, but to be interpreted in accordance with its terms in the light of the rules of law applicable thereto, and as so interpreted it passed no title to the patentee to the lands in question.

The Statute of Limitations is not invoived in any of the questions certified to this Court.

Even if the patent be held validated by any Statute of Limitation under the doctrine of *U. S.* v. *Chandler-Dunbar Co.*, 209 U. S., 450, it still would be operative *only in accordance with its express language*, and as an entirety; and would, therefore, convey no title to the premises in question.

POINT XIV.

Appellees' position respecting the function of the Land Department.

At pages 36 and 37 of the Brief for Appellees the following statement is made:

> "While the Interior Department has frequently been described as a special tribunal, or as a quasi-judicial tribunal, *the facts remain that it is, in respect of the issue of patents, a purely administrative body*, and that its act

> in issuing a patent is a mere ministerial function. There is a certainly nothing about the railroad land grants which renders the exercise of the functions of the Department with reference to them any more judicial than the functions which the Department is called upon to exercise under most public land grants, but the contrary rather, and yet it has never been suggested under land laws generally that every fact which the Department is required to determine prior to the issue of a patent must be affirmatively stated in the patent. We do not understand that the rule frequently announced to the effect that the issue of a patent presupposes the existence of all prerequisites to its issuance is derived in any sense from any supposed judicial character of the duty performed by the Department."

The essence of this contention is found in its closing words. Appellees seem to claim that the nature of the duty performed by the Land Department settles the question whether or not the Department has a judicial character in making its decisions in such cases. In this contention there is little with which we have to quarrel. Taking the matter superficially only, this argument would refer the entire question back to the Statute of 1866, which expressly excepted the lands "not mineral." Our whole argument is primarily derived from this reservation in the act, and we should be entirely ready to accept the estimate of the Land Department's function that, at this point in their brief, is apparently satisfactory to appellees.

It is, however, also the fact that the appellees commence their brief (Point I) with the thesis that the issue of a patent under this grant itself involves a *determination* by the Department of the Interior that the lands described therein are non-mineral lands and that the presumption of such a determination is conclusive as against the appellants. The passage above quoted must therefore be taken in a relative sense rather

than at its face value. The appellees would seem to mean that the functions exercised by the Land Department respecting railroad land grants are no more judicial than those which they exercise under most public land grants. The appellees' query would then seem to be, *how judicial* may the functions of the Department be said to be? Without conceding that public land grants and railroad land grants do not present points of dissimilarity, there is apparently in the minds of counsel for the appellees some conception of a *degree* of judicial function, greater or less, exercised in arriving at the "determination." And this determination is based, not upon the nature of the duty performed, but upon the statute under which the duty is directed to be performed. From appellants' point of view it makes very little difference to what extent the function of the Department is judicial or otherwise. The patent is based upon facts, and the nature of such facts is provided by the Act of 1866. If ministerially, judicially or in any other fashion the Land Department had ascertained the existence of the necessary facts, we should not be here to argue the matter. The truth is, however, that no determination of any matters whatever other than to sign, seal and deliver the patent to the railroad company, has ever been reached by the Land Department.

The real inference from the quotation just made from counsel's brief is that appellees repudiate the theory that the Interior Department acted *judicially* in connection with the issuance of this patent.

This repudiation seems to us to be conclusive in our favor.

For if the patent is not the record of a judicial decision, what is it?

If counsel say that it is merely a confirmation of the original grant, they are out of court, for the original grant under no circumstances authorized the transfer of title to mineral lands.

If driven from that position they say that it is a mere conveyance and not in any sense a judicial act, they fare equally badly; for, in the first place, as a conveyance the authority to make it is limited by the terms of the grant, and, in the second place, it did not even purport to exceed the authority created by the grant, for it contained an exception and exclusion of mineral lands, which exception and exclusion pursuant to the *Barden* decision and the other considerations advanced in this brief are absolutely operative to effectually prevent the passage of title to lands which in fact were mineral lands.

And if the patent is neither a judicial record nor a confirmation of the grant nor a conveyance what, again we ask, is it? Is it a mere unclassified and unclassifiable thing governed by its own principles and not dependent upon any general theories of law for its interpretation and support? Manifestly this alternative is too nebulous to think of. As a matter of fact, as we have above shown, a patent possesses the characteristics both of a deed and of the record evidence of a judgment. The latter characteristic is the only one on which appellees could possibly depend; and if, as is the case, they repudiate allegiance to this idea, they deal at the same time a death blow to their entire contention.

POINT XV.

As to appellees' claim that the question involved is not one of jurisdiction.

On pages 38 and 39 of their Brief it is said:

> "In granting the patent in suit the Department clearly had jurisdiction of the subject matter, for such jurisdiction was conferred by the Act of Congress and by the Joint Reso-

lution. These were admittedly public lands, and the Department was authorized to convey them if they were ascertained to be non-mineral lands as to which the United States had full title, free from pre-emption or other claims or rights, etc. The subject matter, therefore, was within the jurisdiction of the Department, and no question of jurisdiction of parties was involved. The identification of the land as non-mineral, or as free from pre-emption and other claim, and as within the twenty-mile limits of the grant, etc., were matters of fact necessarily presented for determination as incidental to the issuance of the patent, which represents the final judgment of the Department. *These matters of fact would not present questions of jurisdiction.*"

In other words, the appellees' position is that the determination of the question of the quality of the lands is covered by the rule which applies to questions of regularity of procedure and not to questions of jurisdiction.

Such a claim as this enables us to directly test the strength of their entire position, for it is absolutely settled by the authorities which we have heretofore cited *that the question is one of jurisdiction and is not one of regularity of procedure.*

The Land Department had no power to transfer mineral lands under the terms of this grant.

Its only jurisdiction to transfer any lands hung upon their being non-mineral lands; and, as we have shown, the only way in which they could gain jurisdiction to transfer lands which as a matter of fact were mineral lands, was by a judicial decision to the effect that the lands in question were non-mineral.

Smelting Co. v. *Kemp*, 104 U. S., 641.
Kent v. *Canal Co.*, 144 U. S., 75.

The determination by the Land Department of this question was absolutely vital to its jurisdiction. If it did not reach such determination, then it had

no jurisdiction to convey lands which as a matter of fact were mineral lands. And the appellees' argument, based as it is upon the theory that its vital and underlying point was one of mere regularity of procedure and not of jurisdiction, is utterly untenable.

POINT XVI.

The application of the foregoing principles of law to the particular questions certified.

If we are correct in the views hereinbefore expressed, the questions certified, Nos. First, Second, Third, Fourth, Sixth and Seventh are readily answered as follows:

I. Question First reads:

> "FIRST: Did the said grants to the Southern Pacific Railroad Company exclude mineral lands which were known to be such at or prior to the date of the patent of July 10th, 1894?"

Answer: Yes. For the following reasons:

1. The Land Department had not acquired and could not acquire jurisdiction to grant such lands.

2. They had previously been located by mineral locators, and the Department had no jurisdiction to arbitrarily annul the entrymen's rights.

3. No jurisdiction was even attempted to be assumed by the Land Department for the reason that it never decided or attempted to decide that the lands in question instead of being known mineral lands were, as a matter of fact, non-mineral, but, on the contrary, the entire matter was left open by the language of the patent itself.

4. Hence the grant in question neither conveyed nor purported to convey known mineral lands.

II. Question Second reads:

> "SECOND: Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?"

Answer: No. For the following reasons:

1. The only way in which title to the lands actually mineral, but supposed to be non-mineral, could be conveyed under the present grant by the Land Department (if under any circumstances the Department had jurisdiction to thus enlarge the grant), was by an investigation duly had upon notice duly given in accordance with reasonable, proper and lawful rules of practice and by a determination of the proper officers to the effect that lands were non-mineral lands. By such a decision the Department would have acquired jurisdiction if it was empowered by the grant to pass upon the quality of the lands.

2. No such notice was given, and therefore the Department had no jurisdiction of the parties interested or complete jurisdiction of the *res*.

3. No such investigation was had.

4. No determination was recited in the patent or in fact made to the effect that the lands were non-mineral lands.

5. On the contrary, the entire question of the ascertainment of the quality of the lands was left open for further consideration, and no jurisdiction to

convey such lands was even purported to be acquired by the Land Department.

6. Nor can the lack of recited jurisdictional facts be supplied by any presumptions contrary to the express language of the record and to the facts themselves.

III. Question Third reads:

> "THIRD: Is the reservation and exception contained in the grant of the patent to the Southern Pacific Railroad Company void and of no effect?"

Answer: No. For the following reasons:

1. It is not inconsistent with any recited or actual decision of the Land Office.

2. It does not operate in limitation of the grant but to effectuate it in accordance with its intent.

3. It is a compliance with the express terms of the joint resolution of 1870.

4. It places beyond question, in express language, the fact that the intent of the Department in executing this patent was to leave open for subsequent consideration the question of the mineral or non-mineral quality of the lands. It is equivalent to an express declaration that no decision was rendered—a declaration which the Department had power to make.

5. It was expressly accepted by the Railroad Company.

IV. Question Fourth reads:

> "FOURTH: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?"

Answer: No. For the following reasons:

1. The mineral reservation is not void, but is valid.

2. The patent is not collaterally attacked in this action inasmuch as we insist that we are upholding it according to its terms.

3. Even if collaterally attacked and if the reservation were void, still, inasmuch as neither from the patent itself nor from any evidence produced in support thereof can proof be drawn of the existence of the necessary jurisdictional facts, the patent is void as to the mineral lands under any circumstances and no presumptions to the contrary are indulged in.

V. Question Sixth reads:

> **"SIXTH: Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?"**

Answer: Yes; but this question is immaterial in the present case where we stand upon the entire failure of the patent to pass title to the lands in question.

VI. Question Seventh reads:

> **"SEVENTH: If the mineral exception clause was inserted in the patent with the consent of the defendant Southern Pacific Railroad Company and under an understanding and agreement between them and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company estopped to deny the validity of said clause?"**

Answer: Yes. For the following reasons:

1. Considered as a deed the patent contained an express reservation universally recognized as valid both as between individuals and as between the Government and a patentee, and by which the patentee by acceptance of the patent became absolutely bound.

2. This is emphatically the case where the patent thus excepted was recorded by the patentee, where sub-grants containing the same exception were made to third persons, and where no objection to the form of the instrument was ever raised during the eighteen years elapsing since its issuance.

3. Considered as a judgment, which no attempt was made to correct, it is binding upon both parties in accordance with its terms, and not otherwise, and no presumptions can be indulged in to the contrary.

POINT XVII.

As to the Fifth Question certified.

This is the only question remaining to be answered.

The subject has been fully considered in our principal brief (pp. 343 *et seq.*), and in a supplemental brief.

Over this ground it is unnecessary for us again to travel, but we cannot refrain from quoting the following language from the latest work upon the subject, published under date of July 1st, 1912:

> "Whatever may have been thought of oil or natural gas at one time, it is now established beyond any question that oil or petro-

leum and natural gas are minerals and judicially must be so treated."

Thornton on Oil and Gas, Sec. 18, 2nd Ed., July, 1912, and many cases cited.
Ohio Oil Co. v. *Indiana*, 177 U. S., 190.

An examination of these authorities as well as the others above referred to will, we think, satisfy the Court that not only is petroleum a mineral from the scientific standpoint, but it has always been so considered by Congress in connection with its public land laws, and by the Land Department in its administration and enforcement thereof.

The supplemental memorandum filed by appellees proceeds on the theory that the question arising under the Act of 1866 as to the meaning of the words "not mineral" is to be decided by the chemical analysis of California petroleum. Unfortunately for this contention, the question before the Court is one of law and not one of chemistry. The definition of the word "mineral," derived from the decisions of this Court and of various State Courts, appears to include practically every article derived from the soil by any of the known processes of mining. The Land Department in an exhaustive opinion (*In re Union Oil Co.*, 25 L. D., 351), in which is reviewed all of the American authorities, has concluded that petroleum is a mineral within the meaning of the United States Statutes affecting the public lands. The legislative position of the Federal Government on the subject is set forth in the Act of Congress approved February 11, 1897 (29 Stat., 526), in which are mentioned "petroleum or other mineral oils," and in which it is provided that petroleum lands may be entered and patented under the placer mining laws. Appellees place their main reliance upon certain British cases, none of which involve a statute or policy at all comparable to the United States Statutes or policy, and upon the Pennysylvania decision of silver (*Re Bush*, 213 Pa. St., 195). Without reviewing the several Pennsylvania cases, many of which

reach a contrary result, suffice it to state that they all involve language or reservations in deeds and that the diverse views adopted seem irreconcilable.

Lastly, so far as this case is concerned, the matter is, we submit, settled in our favor by the language of the Act of 1866, which says:

> "All mineral lands * * * are hereby excluded from the operation of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated AGRICULTURAL lands * * * may be selected.",

except Coal and iron

IN OTHER WORDS, THE WORD MINERAL IS USED IN THIS ACT IN DISTINCTION TO AGRICULTURAL. IT COVERS ALL LANDS MORE VALUABLE FOR NON-AGRICULTURAL PURPOSES THAN FOR AGRICULTURAL PURPOSES.

PETROLEUM LANDS CERTAINLY FALL WITHIN THE NON AGRICULTURAL CLASS.

Dated January 6th, 1913.

Respectfully submitted,

EDMUND BURKE,
In *pro per.*

FREDERIC R. KELLOGG,
ROBERTS WALKER,
EDMUND BURKE,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

NO. 682.

EDMUND BURKE, APPELLANT,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING & OIL COMPANY, APPELLEES.

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

In view of the brief filed in this cause by the Northern Pacific Railway Company, as a friend of the Court, and upon further research concerning the validity of the mineral exception in the patent, it has seemed desirable to prepare a supplemental memorandum setting forth more fully than in any preceding brief the history and effect of this clause.

The points to which we desire to call attention are:

I.

History of the Mineral Exception.

Prior to 1860 such railroad land grants as had been made by the government covered principally lands in

which minerals were not found to any substantial extent.

In 1862, however, grants of western lands which were supposed to be rich in minerals were commenced; and, as shown in point I of our brief of argument, continued until 1871. During this time, as shown by the government's brief, the total amount of lands thus granted aggregated something like one hundred and twenty-five million acres.

No adequate provision whatever was made at the same time by Congress for any real examination of these lands for the purpose of ascertaining what parts of them were mineral, and what parts were non-mineral in quality.

Confronted by this situation, the then Acting Commissioner of the Land Office, as shown by the government's brief, formulated in 1865 the mineral exception clause, substantially as found in the present patent, which exception was thereafter inserted in all, or practically all, railroad land grant patents until 1904.

This clause was devised for the express purpose of protecting the interests of the United States in connection with the exceptions of mineral lands in railroad grants, in the only way which was possible in view of the existing resources and powers of the land department.

As further shown by the government's brief, this custom was fully reported to Congress in 1868.

In 1870 the joint resolution regarding the Southern Pacific grant was adopted.

In 1895 Congress recognized the difficulty of the situation by appointing a special commission for the purpose of ascertaining such mineral lands as were included in the Northern Pacific land grant.

In 1904 the use of the mineral exception was discontinued, under Secretary Hitchcock's ruling, which was made upon an *ex parte* application of the Northern Pacific Railroad.

The practice of using the mineral exception was, however, resumed in 1911, and has since been continued to the present time.

The mineral exception was therefore born of absolute necessity.

The terms of the railroad grants were specific in their exclusion of mineral lands.

But there was no possible way in which mineral lands could be excluded, save by the use of this exception in the patents.

And the necessity and propriety of adopting this mode was expressly recognized both by the land department and by the various patentees, and was at least tacitly, and we say expressly, recognized by Congress as well.

II.

Grounds Upon Which the Mineral Exception is Attacked.

They are three:

1. Upon the claim that the exception might be as broad as the grant.

2. Upon the claim that the exception is void for uncertainty.

3. Upon the claim that it was beyond the power of the land department to insert it in the patent, and that therefore it must be regarded as superfluous.

III.

As to the Claim That the Exception is Too Broad.

This point is not argued by the appellees, but is argued in the Northern Pacific brief. The answers to it are:

1. That this is a mere common law rule, based upon authorities of much antiquity, and is wholly inapplicable to the construction of a statutory land grant.

> "It is always to be borne in mind in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the will of Congress. That intent should not be defeated by applying to the grant the rules of the common law which are properly applicable only to transfers between private parties. * * * But the rules of the common law must yield in this, as in all other cases, to the legislative will."
>
> M. K. & T. R. R. v. K. P. R. R., 97 U. S., 497.
> U. S. v. S. P. R. R., 146 U. S., 598.

2. In the next place, even this technical rule of the common law does not apply, where there is a mere possibility that the exception might prove as broad as the grant.

See Van Ness v. Rooney, 160 Cal., 131.

3. Moreover, the matter, so far as land grants are concerned, seems to us to be settled by the specific language of the Barden case, quoted in point VIII in our brief of argument, as follows:

> "And it will hardly be pretended that Congress has not the power to grant portions of the

public land with a reservation of any special products thereof, whether minerals or quarries contained therein, and whether known or unknown."

See page 314.

4. Manifestly, if the grant containing such a reservation is legal, a patent issued in strict conformity with the terms of the grant cannot be successfully attacked upon this ground.

IV.

As to the Claim That the Mineral Exception is Void for Uncertainty.

This is specifically disposed of by the cases cited in the last point of this memorandum. (97 U. S., 497, 146 U. S., 598.)

The Court said, as a part of the quotation above given—

> "To the validity of such transfers (i.e., between private parties) it may be admitted that there must exist a present power of identification of the land. * * * But the rules of the common law must yield in this, as in all other cases, to the legislative will."

V.

As to the Claim That the Mineral Exception is Void Because in Excess of the Power of the Land Department.

The cases relied upon by the appellees are Cowell v. Lammers, Francoeur v. Newhouse, Deffebach v. Hawke, Davis v. Weibbold, and Shaw v. Kellogg.

These cases have already been discussed in part in our brief of argument on pages 42 to 44, inclusive.

But we wish now to make, more clearly than before, the point that

In every one of these cases the mineral exception which was disapproved by the court was not in accordance with the terms of the grant or law under consideration, but operated to change the legal rights of the parties.

Thus in the first two cases above mentioned, the grant was construed by the court as only excepting lands which were known to be mineral at the time of the grant. The patent which was issued many years after contained the same mineral exception as that which is at issue in this case. In other words, the language of the exception in the patent did not limit the exclusion of mineral lands to those which were known to exist at the time of the grant, but was so broad as to exclude all mineral lands which either at the time of the patent or thereafter might be discovered to be mineral.

In other words, if the exception had been considered valid, it would have been absolutely inconsistent with, and would have enlarged the legal effect of the grant itself, as the court then construed it.

We have already called attention in our brief of argument to the fact that the construction which the court put upon the grant in these two cases, as limiting the exception to lands which were known to be mineral at the time of the grant, was repudiated in the Barden case.

In Deffeback v. Hawke, exactly the same situation arose, and the specific reason given by the court for repudiating the mineral exception was that this ex-

ception, if it had been inserted, would have been without support in any of the legislation of Congress, and would have been inconsistent with the rights which this legislation gave to the patentee of the lands.

In Davis v. Weibbold, we again find precisely the same situation, for the exception in the patent, if it had been given operation by the court, would have been inconsistent with the rights given by law to the patentee. The court specifically put its decision upon the ground that the officers of the land department could not limit or enlarge the rights of any patentee—a proposition in which we are in hearty accord.

In Reynolds v. the I. S. Mining Company, 116 U. S., 687, it was expressly intimated that a mineral exception which was in strict accord with the terms of the statute, would be valid.

The same intimation was made in Noyes v. Mantle, 127 U. S., page 354.

And in the Barden case it was expressly stated, at page 331, that the government would not be authorized to issue a patent covering lands supposed to be mineral without excepting these mineral lands until it could have an opportunity to make an adequate examination of the territory.

In other words, we believe it to be a rule established by the unvarying current of authority that the mineral exception strictly in accordance with the terms of the statute or grant, is valid, whereas such an exception contrary to such terms is void.

Tested by this criterion, the exception in the present patent is absolutely valid, since it is in strict conformity with the intention of Congress, as manifested in the original grant and in the joint resolution.

VI.

As to the Effect Upon the Patent in Case the Mineral Exception Was Held to Be Illegal, as Beyond the Power of the Department.

In their arguments in the courts below, and upon the present appeal, counsel for the appellees appear to proceed upon the theory that if they can strike the mineral exception out of the patent, their course will be clear, and they will be enabled to rely upon the general language of the granting clause as giving them full title to all lands described, whether mineral or not.

Such a contention is submitted to be wholly baseless.

The patent, whether the mineral exception be considered good or bad, was drawn, signed and issued as an entirety.

The general words which it contains were expressly qualified and limited in their effect by the mineral exception.

The government never for one moment intended to absolutely grant all of the lands described, but only to grant them subject to the express qualification of the mineral clause.

The instrument was and is a unity and the intent of the parties to it can only be ascertained by considering it as a whole, as an entirety, and not by disgambering it into its component parts.

And if any part of this entire instrument be considered as void, and if the elimination of it from the consideration of the instrument would result in giving to that instrument an intent different from that in the mind of its maker, then *the entire instrument, and not merely the eliminated part, must be taken as void and ineffective.*

This principal is, we submit, perfectly established.

Cases which are most nearly analogous arise where statutes have been held to be unconstitutional in part.

In all such cases if the part held unconstitutional modifies or effects, or otherwise qualifies the part which is not held unconstitutional, the entire statute will be held void and not merely the particular part criticised.

The rule is entirely different if the various parts of the same statute are entirely separate and distinct, so that the full legislative intent of the good part can be given effect without modification, and the legislative intent in the bad part can be annulled without affecting the good.

But wherever a statute consists of two parts, one of which contains general language, and the other of which contains a proviso or an exception qualifying this general language, then if the exception or proviso is held to be bad, the entire statute falls.

> *"If by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."*
>
> Lewis' Sutherland on Statutory Construction, Section 308-307.

We are, therefore, in a position where we can look with much calmness upon the efforts of the appellees to taint the only source of their alleged title to these mineral lands.

The mineral exception is either perfectly valid or perfectly illegal.

If the first alternative be adopted, the railroad gets

no title to any mineral lands, for no such title was intended to be conveyed.

If the second alternative be adopted, then this exception, being a proviso, affects the validity of the entire instrument, which must be construed as a unit, and the whole patent falls to the ground.

If this be so the situation is then the same which would exist if no patent had ever been executed.

And if this is true, then the appellees' title stands merely upon the original grant which, of course, excluded mineral lands.

In either event the contention of the appellant must, it is submitted, prevail.

Respectfully submitted,
FREDERICK R. KELLOGG,
ROBERTS WALKER,
EDMUND BURKE,
Of Counsel for Appellant.

January 10, 1913.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, *Appellant*,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

No. 280.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, *Appellants*,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM ON BEHALF OF APPELLANTS IN REPLY TO SUPPLEMENTAL MEMORANDUMS BY THE SOUTHERN PACIFIC RAILROAD COMPANY, ET AL., AND BY THE UNITED STATES.

In the supplemental memorandum on behalf of the United States filed by the Solicitor General, it is very briefly

brought out that in the oral argument and in the briefs submitted prior to that time the question presented by the fifth question certified to this court by the Circuit Court of Appeals was treated as a question of law. That question reads:

> "Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral lands from the railroad land grants?"

Counsel for appellants did consider the question as presenting a question of law, and counsel does not now understand that it is within the province or authority of the Circuit Court of Appeals to certify to this court, for its consideration and answer any other question than one of law.

As to the supplemental memorandum filed by the Southern Pacific Railroad Company and Kern Trading and Oil Company subsequent to the oral arguments, confined to a consideration of the fifth question, it appears there was attached to that memorandum as an exhibit a copy of a thesis prepared by Mr. E. T. Dumble, consulting geologist of the Southern Pacific Company. The Solicitor General takes exception to the contents of this thesis, both as to its substance and as to the correctness of the quotations from other scientists, especially the chief geologist and the chief chemist of the United States Geological Survey.

Counsel for appellants do not desire to in any manner enter into the controversy between the representatives of the Southern Pacific Company and the representatives of the United States concerning the accuracy or propriety of Mr. Dumble's thesis. At most, Mr. Dumble's statements and those of the scientists whom he cites are only the opinions of a limited number of scientists upon a question that they admit is controverted and concerning which there is a diversity of opinion among them, which, from the viewpoint

of the scientist, is irreconcilable. The main reason which leads counsel for appellants to submit this memorandum is the undue importance that seems to be attempted to be given to the fifth question in the determination of this controversy and especially to what seems to us the unwarranted importance given to the scientific discussion of the question of fact, as to whether or not, from the viewpoint of the scientist in his classification of substances, petroleum should be classified as a mineral substance.

The question presented by the record before the court is a question of law, which is not dependent upon whether petroleum is an organic substance or distillation of an organic substance through natural processes, or is of inorganic origin. The question is, what was the intent of Congress when it excepted from the grant to the railroad company all mineral land, without limitation or restriction, other than coal or iron land. The answer to that question, in our opinion, depends upon whether, *as a matter of law,* petroleum is a mineral. When Congress made the grant it did not contemplate that the substances that would be held to be minerals and sufficient to except lands containing them from the grant, were to be identified by the opinion of scientists, especially where the scientists themselves are in irreconcilable disagreement. We prefer to think that Congress intended that this question in case of controversy should be decided and determined by the judicial tribunals of the Government.

When the briefs were submitted prior to the oral argument it was the opinion of counsel for appellants that this question had been so well settled by the courts that no ground for extensive discussion or elaborate consideration existed. In the case of Northern Pacific Railroad Co. vs. Soderberg, 188 U. S., 526, this court said:

"The rulings of the land department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, *petroleum*, limestone, building stone, and coal. * * *

We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the Act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say we see nothing in that Act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, *we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.*" (Italics ours.)

When the Soderberg case was before the United States Circuit Court, Judge Hanford in considering this question used the following language:

"In common and ordinary signification the word 'mineral' is not a synonym for 'metal,' but is a comprehensive term, including every description of stone and rock deposit, whether containing metallic substances or entirely non-metallic. * * * If Congress had intended by this Act to interpret the reservation

clause of the granting Act so as to give a restricted definition to the word 'mineral,' there is no good reason why it should not have directed that only land valuable for the metalliferous minerals therein should be classified as mineral land; but it is significant that, instead of prescribing any such limited rule, the words of the Act correspond with the words in the grant expressing the purpose to reserve all minerals, the test being, not the nature or quality of the mineral, but its value; and lands containing any mineral deposits of sufficient value to be subject to sale by the Government under the provisions of the United States mining laws are required to be classified so as to come within the class of lands which are reserved."

The land department uniformly has held that petroleum is a mineral and has disposed of the public lands containing deposits of petroleum under the placer mining laws. This practice has been followed by the land department ever since the enactment of the mining laws in 1872. In the case of Pacific Coast Marble Company vs. Northern Pacific R. R. Co., *et al*, reported in 25 L. D., 233, the question of what is mineral is considered at length and previous holdings by the Secretary of the Interior, as well as other authorities, are reviewed, and it is held,

"That lands containing valuable mineral deposits, whether of metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry, under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are 'mineral lands' within the meaning of that term as used in the exception from the grants to the railroad company and to the State."

And in the case of Union Oil Company, 25 L. D., 351, it was specifically held that petroleum is a mineral and lands

containing deposits of petroleum were excepted from the grant to the Southern Pacific Railroad Company made by the Act of March 3, 1871, which Act is in precisely the same words as the Act of July 27, 1866, involved in this case. The Secretary calls attention to a decision of the Department holding that petroleum is not a mineral, rendered by Secretary Hoke Smith August 26, 1896, and to the prompt action of Congress in correcting the error of the Secretary by the passage of the Act of February 11, 1897. The holding in the Pacific Coast Marble Company, *supra*, was adhered to:

> "That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and qaulity sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."

In Murray vs. Allard, 100 Tenn., 100, 39 L. R. A., 249, the question was considered very carefully and exhaustively. This was a suit to determine title to petroleum under land which had been granted by a deed containing a clause reserving to the grantor "all mines, minerals, and metals in and under the land." This deed was dated October 24, 1853, thirteen years before the approval of the Act of July 27, 1866, and forty years prior to the issuance of the patent involved in this case. Subsequent to the deed containing the exception clause conveyances had been made to third persons without reservation and the present owners held under a deed conveying in fee simple without reservation. The trial court held that petroleum was not embraced in the term "mineral," the Court of Chancery Appeals reversed the trial court in an opinion which the Supreme

Court of the State characterized as "very exhaustive, elaborate, learned, and able," and which it adopted in full as its opinion. The court exhaustively reviewed the scientific authorities from which it found that "Clearly, from this description of the substance it could not in any sense fall under the terms 'metal' or 'metallic,'" and said: "The question, then, to be determined is, does it fall within the terms 'mines and minerals'? In 2 Rapalje & L. Dict., p. 821, it is said: 'In the most general sense of the term, minerals are those parts of the earth which are capable of being got from under the surface for the purpose of profit. The term therefore includes coal, metal ores of all kinds, clay, stone, slate, and coprolites,'" and quotes from 15 Am. and Eng. Enc. of Law, page 500, as follows:

> "'Minerals' originally signified that which is obtained from a mine, from underground workings as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paintstone and similar substances; * * *"

and further says:

> "We have found only one authority opposed to the conclusion that petroleum is a mineral, that is the case before referred to, of Dunham vs. Kirkpatrick, 101 Pa., 36, 47 Am. Rep., 696. The great weight of authority is not only opposed to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature, such as gold, silver, copper, lead, etc.; that, in the popular estimation, petroleum is not regarded as a mineral substance any more than is animal or vegetable oils; and that it would only be classified as such in the most general and scientific sense. So, in the light of this assumed general

> view of the bulk of mankind, petroleum was held not to fall within the reservation as to minerals. We think, however, that the true meaning of the word 'mineral,' as well as the meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals. This case seems to be opposed in principle by the later case of Gill vs. Weston, 110 Pa., 313, where petroleum was held to be a mineral substance in construing the Pennsylvania act of 1855 concerning the mortgaging of terms of mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.' In the light of these authorities we are bound to hold that petroleum is a mineral, and that it falls within the term of the reservation in the deed fererred to in the foregoing case."

In Kelly vs. Ohio Oil Co., 57 Ohio St., 317, 39 L. R. A., 765, the Supreme Court of Ohio holds that,

> "Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract."

In Wilson vs. Hughes, 39 L. R. A., 292, the Supreme Court of West Virginia quotes with approval a number of cases holding that oil is a mineral and being a mineral is part of the realty. In Sult vs. Hochstetter Oil Co., 63 W. Va., 317, the Supreme Court of West Virginia unqualifiedly held that petroleum is a mineral and as such came within the general exception of minerals contained in a deed dated March 9, 1880. The court said:

"This brings us to the construction of the reservation clause in the deed from Eleanor Marshall to Elzada I. Harrison, reading as follows: 'And the party of the first part reserves to herself the right to all minerals in and under fifteen acres of the land conveyed,' which fifteen acres is described in the deed by metes and bounds. The meaning of the term 'minerals,' in the law of conveyancing, has received very great attention by the English courts, and MacSwinney on Mines, p. 12, predicates, upon a thorough review and analysis of the English decisions, the following conclusions: '*Prima facie,* the word mineral must be taken to have a more extensive meaning than its etymology would seem to justify. It has, in fact, been laid down that mineral will, *prima facie,* include every substance which can be got from underneath the surface of the earth for the purpose of profit. And this is apparently the strict scientific meaning of the word. Mineral will, therefore, *prima facie,* include not merely such articles as coal and ironstone and freestone, but fire-clay and chine-clay or porcelain-clay, and also every kind of stone, flint, marble, slate, brick-earth, chalk, gravel, and sand: provided only that these articles are under the surface, and do not lie loosely upon it.' A vast array of authority cited by him, which need not be analyzed here, sustains this conclusion and shows that the word minerals found in a deed, lease or other contract, unqualified and unrestricted by any other clause in the instrument or by icrcumstances within the knowledge of the parties which may reasonably be deemed to have determined their intention, is given this broad meaning and effect. He says, however, that in all cases a *prima facie* meaning of the word will yield to the intention of the parties, when, from the language of the instrument in question, such intention is made reasonably clear, or the particular circumstances under which an instrument of sevseverance takes place shows an intention to restrict its meaning, and, in doubtful cases, its meaning will be restricted to that given it by the customs of the coun-

try in which the contract is to operate. *Id.* 15, 17. As to whether oil or gas are minerals, these decisions are silent, presumably for the reason that no litigation involving these substances seems to have arisen in the courts of that country; but, in view of the holdings, and the expressions of opinion, found in English decisions, defining the meaning of the term, and extending it to every substance or material that can be profitably taken and used from beneath the surface, no doubt can be entertained as to what the conclusion would have been, had such a question been presented, and the principles declared point unerringly to the view that both these substances would be regarded as minerals in the law of contracts. *That such is the prima facie meaning thereof, in general law, is universally declared by the courts of this country. This is so well understood that no authority for it need be cited."*

The court then refers to Dunham v. Kirkpatrick, 101 Pa. St., 36, and Dettor vs. Holland, 57 Ohio St., 492, which hold that oil is not a mineral and says concerning the doctrine followed by the Supreme Court of Pennsylvania:

"In many cases, the court has held oil to be mineral in the sense that it is part of the realty. Stoughton's Appeal, 88 Pa. St., 198; Funk vs. Haldeman, 53 Pa. St. 229. It was held to be a mineral substance within the meaning of the statute providing for mortgages on mining land. Gill vs. Weston, 110 Pa. St., 312. Oil and gas are held to be minerals, and, therefore, a part of the corpus of the land, as between life tenants and remainder men. Blakley vs. Marshall, 174 Pa. St., 425. Marshall vs. Fallon, 179 Pa. St., 371. It is to be observed, in this connection, that these decisions do not necessarily conflict with that of Dunham vs. Kirkpatrick, for they declare that, *in a legal sense, oil and gas are minerals,* while the other case declares that, as tested by the intention of the parties to a deed, disclosed by the terms therein, viewed in the light of the

popular meaning of the term, a mere matter of contract, they are not minerals. The determination of the question of intention by that standard seems to us inevitably to produce a contrary result. Legally and scientifically, oil and gas are universally held to be minerals. At the present time they are popularly so considered."

In Weaver vs. Richards, 156 Mich., 320, decided April 14, 1909, the Supreme Court of Michigan held that the word "mineral" or "minerals" without qualification would include both oil and gas. The court said:

"The instruction of the circuit judge to the jury very clearly covered the case upon this ground, unless there was error in the instruction complained of, as follows: That the use of the word 'mineral' or 'minerals' without any qualification, would include both oil and gas, and therefore that a reservation of minerals in place in the earth would include both gas and oil, coupled with the instruction that a reservation of such minerals would imply the right to prospect, explore for, and remove these minerals.

It is contended by the plaintiff, on the authority of Dunham vs. Kirkpatrick, 101 Pa., 43, that the use of the words 'all minerals' is not sufficient in a reservation to include petroleum, oil, or gas. So far as our examination goes, this case stands alone. The weight of authority is decidedly in favor of the construction given by the trial judge. A well-considered case is that of Murray vs. Allred, 100 Tenn., 100 (39 L. R. A., 249). In this case the authorities are collected and need not be here repeated. The reasoning of the court is convincing, and its criticism of Dunham vs. Kirkpatrick, is, we think, justified. The ruling of the circuit court upon this point was correct."

We have cited and quoted from the opinions of the highest courts of Pennsylvania, West Virginia, Ohio, Tennes-

see and Michigan from the decisions of the Secretary of the Interior whose jurisdiction extends to all the public land States and from an opinion of this court, all of which hold that petroleum is a mineral. This is the law of these States and also of California, and they contain the most important oil-producing areas in the United States. Wherever the question has been adjudicated it has been held that petroleum is a mineral. The only cases we have found holding to the contrary are Dunham vs. Kirkpatrick, 101 Pa., 36; Dettor vs. Holland, 57 O. St., 492, and the opinion of Secretary Hoke Smith, all of which have been distinctly and unequivocally disapproved by the same tribunals from which they emanated. It is rarely that such a unanimity of opinion is found to be entertained by the courts upon any question.

At the time this grant was made to the Southern Pacific Railroad Company Congress had before it a report by Professor S. S. Hays which had been transmitted to the Speaker of the House of Representatives February 26, 1866, by the Secretary of the Treasury. 39th Congress, 1st Session, Ex. Doc. No. 51. In this report Professor Hays considers petroleum as a source of national wealth, discusses the history of the petroleum industry in the United States and elsewhere, gives chemical analyses, states tables showing production in various districts, together with other information. It can not be said that Congress was without knowledge of the subject. If it was intended that the grant should operate to transfer to the railroad company petroleum lands it certainly would have named petroleum lands as well as iron and coal lands. If any doubt existed as to the intention of Congress it should be removed by its action in promptly correcting by legislation the erroneous holding of the Secretary of the Interior as above set out.

We do not wish to be understood as suggesting that this question has been thrust forward by counsel intentionally to befog the real issues that should determine the decision in this controversy. We regret that counsel for the Government and counsel for the defendants have taken so seriously this controversy between their respective geologists as to make it the subject of especial attention for the consideration and determination of this court in this case. As we have shown, the courts repeatedly have declared that the overwhelming weight of scientific authority holds that petroleum is a mineral and that "in a legal sense" it is a mineral. There seems to be little controversy over the question, except between the geologists for the Government and the geologists for the railroad corporation. We think this controversy does not merit the attention of this court. It should not be permitted to transcend the more important and far more difficult questions before the court in this case, and we rest confident it will receive the attention it merits.

D. J. HINKLEY,
T. J. BUTLER,
Attorneys for Appellants.

FILED
DEC 17 1913
JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 270.

EDMUND BURKE, APPELLANT,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 280.

J. L. LAMPRECHT and F. M. AIKEN, TRUSTEES, APPELLANTS,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

On a Certificate from the United States Circuit Court of Appeals from the Ninth Circuit.

Memorandum of December, 1913, by Appellant, Edmund Burke, in Reply to Supplemental Memorandums by the Southern Pacific Railroad Company et al. and by the United States.

FREDERIC R. KELLOGG,
ROBERTS WALKER,
Counsel for Appellant Burke.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, APPELLANT,

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SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 280.

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v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Memorandum of December, 1913, by Appellant, Edmund Burke, in Reply to Supplemental Memorandums by the Southern Pacific Railroad Company et al. and by the United States.

Pursuant to leave of the Court, the appellant Burke files this supplemental memorandum. In the Burke case (No. 279) and the Lamprecht and

the Aiken case (No. 280), the United States, during the present month, has filed herein a supplemental memorandum to which the defendant Railroad Company has filed a replying memorandum. In these memorandums discussion has been had of the chemical and geologic nature of petroleum. The subject has been approached as if it were wholly or almost entirely a question of fact. These appeals are before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit and, inasmuch as questions of law alone were certified, these appeals do not involve the decision of questions of fact, but necessitate the solution of legal questions arising in connection with the grant to the Southern Pacific Railroad Company, under the Act of July 27, 1866, Section 3.

We submit that the Fifth question was properly certified as a question purely of law and of statutory interpretation, and that the chemical or geological facts relating to the creation and nature of petroleum are wholly irrelevant, for the following reasons:

1. *Under the grant in question the term "mineral" (with the exception of iron and coal, which will be alluded to later) is used as meaning simply "non-agricultural."*

> See Lien Land Provision, Sec. 3, Law of July 27, 1866.
>
> See Appellant's Brief of Argument and Reply Brief, page 62.

Petroleum lands are certainly not agricultural lands.

The grant embraced "every alternate section of the public land, not mineral." As a question of law, only two categories may here co-exist, viz.,

(1) mineral lands and (2) lands not mineral. There is no possibility of a third category. Even if there should be found beneath the surface of the ground substance concededly animal or organic in character (as, for instance, guano), such land would, nevertheless, have to be classed as either mineral land or as non-mineral land, as a matter of statutory interpretation based upon the language of the grant. The language of the grant does not admit of the existence of a third category such as lands containing subjacent substances not concededly geological or mineral, but likewise not recoverable by any of the ordinary processes of agriculture or lumbering. It is therefore submitted that the discussion of the chemical and geological nature of petroleum is beside the mark.

2. A reductio ad absurdum *would follow if the question of the nature of the lands were attempted to be disposed of chemically or geologically.*

For all soil is mineral, chemically and geologically considered.

Notably would this be so in the case of desert land like the present.

Hence, if this test be applied, there would never have been any land grant at all, which, of course, is an absurdity.

3. *That the meaning of the word "mineral" in this Land Grant was not intended by Congress to be determined chemically or geologically is further shown by the fact that the grant expressly provides:*

> "Provided further that the word 'mineral' when it occurs in this Act shall not be held to include iron *and coal*."

Evidently Congress recognized that coal would have been considered as a mineral had it not been excepted from that category.

But there can, of course, be no question but that coal is a substance purely organic in its origin.

It is, therefore, plain that Congress was paying no attention whatever to chemical or geological considerations.

4. *The clear trend of statutory enactment and judicial decision has been that in the absence of special provisions to the contrary, the term "mineral" is intended to refer to substances in the earth's crust which are sought for and removed by man for the substances themselves.*

1 *Snyder Min.*, Secs. 134, 140, 143, 145.
2 *id.*, Sec. 926.

In other words, where the principal value of lands lies in substances therein contained which value can only be developed by the extraction of such substances, the lands are ordinarily mineral and not agricultural lands; and *vice versa*, unless special exceptions exist in some statute or private grant.

Under this definition it is needless to say that petroleum lands fall within the non-agricultural, or mineral, class.

5. *This view has, we think, been consistently followed by the Courts of the United States in cases involving petroleum as well as many other substances, arising under land grants and otherwise.*

Northern Pacific v. *Soderberg*, 188 U. S., 526.

Webb v. *American Asphaltum* Co., 157 Fed. Rep., at page 207 (Van Devanter, J.).

"Oil and gas *being minerals* and to be regarded as real estate," etc.

Lindsley v. *The Gas Co.*, 162 Fed. Rep., 958, affirmed, 220 U. S., 74.

"The instrument was more in the nature of a grant * * * of all the oil and gas in the lands described—*these minerals* being part of the realty," etc. * * * "Oil and gas are usually found in porous rock * * *. Unlike coal, iron *and other minerals* they do not have a fixed situs."

Brewster v. *Lanyon Zinc Co.*, 140 Fed. Rep., at pages 807, 809, 815, 817.

Kansas Gas Co. v. *Haskell*, 172 Fed. Rep., 562, at pages 562, 564, 573.

Gird v. *California Oil Co.*, 60 Fed. Rep., 531.

"True it is that oil and gas, *like other minerals*, are situated," etc.

Ohio Oil Co. v. *Indiana*, 177 U. S., at page 202, bottom (Mr. Chief Justice White writing the opinion).

Bacon v. *Walker*, 204 U. S., at page 316, approving 177 U. S., 190 (Mr. Justice McKenna writing the opinion).

Oklahoma v. *Gas Co.*, 221 U. S., 229 at pages 252-260, approving 177 U. S., 190 and 220 U. S., 61.

6. *Under the rulings of the Land Department and the Act of 1897, the same situation exists.*

The uniform practice of that Department was to treat petroleum lands as mineral lands until the

decision of Secretary Hoke Smith on August 26th, 1896, to the contrary. This decision was immediately followed, however, by the Act of Congress approved February 11th, 1897 (29 Stat., 526) restoring the former practice.

This was followed by the decision of the Department in the Union Oil Company case (25 L. D., 351), specifically holding that petroleum is a mineral.

In other words, we submit that not only in land grant cases, but in all other cases known to us, in which the Federal Courts and the Land Department have passed upon the question (with the one exception above quoted, which was immediately corrected), petroleum land has been treated as mineral land both within the intent of the law-making bodies and the Courts in connection with the various questions which have arisen, and Congress has expressly approved this view.

7. *The claim that this question, arising as it does under a land grant, should be disposed of as a question of fact and not of law, is, we think, disposed of by the ruling in the Soderberg case:*

> "The fact that the Land Department has not determined whether the land in question was mineral or non-mineral *does not involve a question of fact*, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral *under the terms of the grant.*"
>
> *Northern Pacific Ry.* v. *Soderberg*, 188 U. S., 528.

In conclusion, we desire to say that the many Congressional enactments have established, we believe, that for purposes of the United States

Railroad Land Grants, all of the public lands of the United States must be considered as arbitrarily divided into agricultural and non-agricultural (with the single exception above stated). *This distinction was never intended to depend upon facts or theories of chemists or geologists.* To hold at the present time that the opinion of learned scientists as to what petroleum really is, should be sufficient to upset this long established classification, would be to endanger the title of thousands of acres of land heretofore filed upon, pursuant to decisions heretofore made, and would, we submit, defeat the clear intention of Congress and overturn the practically uniform current of decisions of the Land Department and the Courts.

Respectfully submitted,

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[3862]

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Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.
No. 279

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.
No. 280

BRIEF ON BEHALF OF NORTHERN PACIFIC RAILWAY COMPANY. FILED BY LEAVE OF COURT.

CHARLES W. BUNN,
CHARLES DONNELLY.

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Supreme Court of the United States

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY. No. 682.

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY. No. 683.

The averments of the bill of complaint, as summarized in the certificate of the Circuit Court of Appeals, were as follows:

> That the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made

after discovery of mineral on the said respective claims; that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands;"

that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never

been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

Upon this certificate seven questions were submitted to be answered by this court of which the second, third, fourth and sixth are as follows:

SECOND QUESTION: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the

quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

THIRD QUESTION: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect.

FOURTH QUESTION: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with.

SIXTH QUESTION: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

With the particular facts, or alleged facts, above certified, and with the questions how far, if at all, they are admitted by the demurrer, and how far they are material, even if admitted, in view of the other facts certified, the Northern Pacific Railway Company is not directly concerned, and hence we do not undertake to discuss them. But it is vitally interested in the answers to be made to the Second, Third, Fourth and Sixth Questions above quoted. It has succeeded to the grant to the Northern Pacific Railroad Company, and, generally speaking, to the obligations as well as to the rights of that grantee. Like the grant to the Southern Pacific Railroad Company that grant was a grant of "every alternate section of public land, not mineral, designated by odd numbers," within certain defined limits. (13 Stat. 365.) It has been in process of administration now for nearly fifty years, and so far as known not an acre of mineral land or of land

thought by any one to contain mineral (except coal and iron, which were included in the grant) has been patented either to the Northern Pacific Railway Company or to its predecessor, the Northern Pacific Railroad Company, nor has either of those companies received, for any of the lands sold by them, a single dollar on account of any mineral value they were supposed to possess. Relying upon decisions of this Court which heretofore have never been questioned, they have accepted the patents issued as confirming in the grantee an absolute title to the lands described in them, subject to be defeated only on direct attack, by a showing of fraud, or imposition, or mistake of law in the procurement or issuance of them. The four questions above quoted suggest doubts as to these fundamental principles. It is possible to consider them abstractly, and apart from the special facts of the case in connection with which they are certified, and it is in this way that we propose to treat them. A negative answer to all or to any one of them would affect Northern Pacific titles precisely as it would those of the Southern Pacific Company; would precipitate anew questions which, for many years, have been regarded as settled, and would be utterly destructive of rights resting upon land grant patents. This is our apology, if any is needed, for the submission of this brief.

SECOND QUESTION: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land

Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

In considering this question it is to be observed:

(1) That it supposes a patent containing no excepting clause. The effect of the excepting clause is dealt with in the Third Question.

(2) That it has nothing to do with a patent purporting to convey lands *known* to be mineral. It deals expressly with "lands *which are thereafter ascertained* to be mineral."

(3) The question is not whether under the circumstances suggested the patent described is *voidable* as to lands thereafter ascertained to be mineral, but whether it "operates to convey" them; in other words, whether it is *void*.

It has been the belief of the profession for nearly twenty years that this question was settled in *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288; and it is startling to find that such a doubt can exist about it anywhere as to require its submission anew to this court.

That mineral lands were excepted from the grants to the Pacific Railroad Companies, and that it was the intention of Congress that title to such lands should not pass to those companies, are propositions about which there has never been any dispute. But it soon became apparent that these grants were of little value if the grantees could give to the lands covered by them only a title which would be rendered worthless upon the discovery of a fact of which everyone was ignorant when the title passed; and it was recognized on all hands that there must be some date at

which the question whether the lands were of the character which Congress had granted—in other words, whether they were mineral or non-mineral—must be taken as conclusively determined. The railroad companies insisted that as to any particular tract of land this date was the date of the filing of map of definite location opposite that tract; whilst the mineral claimants insisted that the question was open until the government should have evidenced its surrender of all claim to the tract by the issuance of a patent covering it.

The question finally came before the courts in an acute form in the *Barden* case. That was an action commenced in the United States Circuit Court for Montana, in 1891, by the Northern Pacific Railroad Company, against Barden and others, to recover possession of a tract of land in Montana lying within an odd numbered section in the place limits of the grant. The line of railroad was definitely located opposite this section July 6, 1882, and on that date the land in question was not *known* mineral land. Six years thereafter, in 1888, veins or lodes of rock bearing gold, silver and other metals were discovered in it; the defendants entered upon and made selections of these lodes, and at the time of the commencement of the action were in possession of the claims so located. No patent had been issued to the railroad company. The defendants demurred to a complaint showing these facts, and the case was heard before Sawyer, Circuit Judge, and Knowles, District Judge (46 Federal, 592). The court divided, Judge Sawyer sustaining the contention of the railroad company and granting the relief asked; Judge Knowles dissenting. The opposing views of the two judges will be gathered from the following extracts from their opinions.

Judge Sawyer said: (Page 603)

"A question has also been suggested in this case, as to when there must be a *'known mine'* in order to take it out of a grant to the railroad company under the exception in the grant? The four points of time suggested, are, the date of the act of congress making the grant; the time of the filing of a map of the general route; the time of the definite location and filing a plat thereof in the office of the Commissioner of the general land office, and the date of the issue of a patent. The ruling of the circuit court for the district of California, heretofore has been, that *the date of the definite location of the line of the road,* is the date at which the mineral character of the land must be known, in order to take it out of the grant. Thus upon the trial of *Francoeur v. Newhouse,* the court so charged the jury. The following is the language of the charge:

'The words "mineral lands," as used in the act of congress, mean lands known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant. * * * The question then arises, whether or not they were known, or there was sufficient reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land.' 14 Sawy. 603, 604, 43 Fed. Rep. 238."

Judge Knowles said: (Page 622)

"The surest means of quieting titles would appear to be, the determining the question of the

mineral character of the land *upon issuing of patents to the same.* As I have said, this would be conclusive upon all subsequent purchasers."

The case was brought to this court and was most elaborately argued in 1894, the Solicitor General appearing, with numerous other counsel, on behalf of the mineral claimants, and the railroad company being represented by Mr. James C. Carter. Here again the question presented was as to the date upon which the question whether lands were or were not mineral was to be deemed settled. That this is so will appear from the following passage from the argument of the Solicitor General, appearing at page 296 of the report:

> But it is said that this construction, which excludes lands in fact mineral from the operation of the grant, works a hardship because it leaves the title of the company forever uncertain in all its lands and liable to be defeated at any time by the discovery of minerals, and it is upon this ground that the opinion of the Circuit Judge proceeds. The objection would be serious if it were well founded. But what is the fact?
>
> The act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.
>
> But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued

a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields's original brief.

The point is also covered by the case of *Davis v. Weibbold,* 139 U. S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act, Rev. Stat. § 2392, that 'no title shall be acquired to any mine of gold, silver, cinnabar, or copper,' does not apply where the mines were discovered after a patent has been issued.

Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell v. Lammers,* 10 Sawyer, 246, 257: 'There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.'

And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior: 'The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.' And again, page 524: 'The grant or patent, when issued, would thus be held to carry with it the the determination of the proper authorities that the land patented was not subject to the exception stated.'

In *Moore v. Smaw,* 17 California, 199, it was decided, in the first opinion delivered by Mr. Justice Field as Chief Justice of the Supreme Court of California, that the patent of the United States passes title to minerals."

This court was divided in opinion, a majority sustaining the contention of the mineral claimants, in an opinion written by Mr. Justice Field. Justices Brewer, Gray and Shiras dissented upon the ground that the character of the land as known *at date of definite location* was controlling. The court held that mineral lands did not pass by the grant; and in answer to the objection that such a holding would leave the railroad company's title forever uncertain, Mr. Justice Field said, at page 326:

> "The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties as-

sert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance.

It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

And again at page 329:

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those

officers that they are one or the other will be considered as conclusive."

It is difficult to see how language could answer a question more plainly than the foregoing passages answer the question of the Circuit Court of Appeals. Every phase of the controversy had been presented and the court was unanimous upon the propositions that title to mineral lands *could* pass to the railroad grantee; that a patent *would* "operate to convey" them; and that in the absence of fraud, imposition or mistake it was conclusive. And as showing that the mere neglect of the Department to perform its duty previous to the issuance of the patent would not impair its validity, the court said, at page 330:

> "It is true that the patent has been issued in many instances *without the investigation and consideration which the public interest requires;* but if that has been done without fraud, *though unadvisedly*, by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

The language thus quoted is but a reaffirmance of what had been said long before by Chief Justice Marshall in *Polk's Lessee v. Wendall*, 9 Cranch, 87, 97, where it is said:

> "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These

rules are, in general, directory; and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is pre-supposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely unreasonable, to avoid a grant in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent."

The distinction between a void and a voidable patent has been noted many times by this court in language which makes it plain that a patent answering to the description contained in this Second Question would not be void. Thus in *Noble v. Union River Logging Railroad,* 147 U. S. 165, the court, after marking the distinction between void and voidable judgments, says at page 174:

"This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been *reserved,* or was at the time *no part of the public domain,* the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk's Lessee v. Wendall,* 9 Cranch, 87; *Patterson v. Winn,* 11 Wheat. 380; *Jackson v. Lawton,*

10 Johns. 23; *Minter v. Crommelin*, 18 How. 87; *Reichart v. Felps*, 6 Wall. 160; *Kansas Pacific Railway v. Dunmeyer*, 113 U. S. 629; *United States v. Southern Pacific Railroad*, 146 U. S. 570.

Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *Smelting Co. v. Kemp*, 104 U. S. 636, 640: 'In that respect they' (the officers of the Land Department) 'exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.' In *French v. Fyan*, 93 U. S. 169, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Steel v. Smelting Co.*, 106 U. S. 447; *Quinby v. Conlan*, 104 U. S. 420; *Vance v. Burbank*, 101 U. S. 514; *Hoofnagle v. Anderson*, 7 Wheat. 212; *Ehrhardt v. Hogaboom*, 115 U. S. 67. In *Moore v. Robbins*, 96 U. S. 530, 533, it was said directly that it is a part of the daily business of officers of the Land Department to decide when a party has by purchase,

> by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. * * * The functions of that department necessarily cease when the title has passed from the government.'"

Mineral lands are, of course, a "part of the public domain" and they are certainly not "reserved" within the language above quoted, because they are patentable by the Department of the Interior upon a proper application for them, and that Department has complete "jurisdiction" over them, and "power or authority to dispose" of them.

This is recognized again in the case of *Burfenning v. Chicago, etc. Ry. Co.*, 163 U. S. 321, where the court says at page 323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not*, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases

of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley,* 13 Wall. 72; *Smelting Company v. Kemp,* 104 U. S. 636; *Steel v. Smelting Company,* 106 U. S. 447; *Wright v. Roseberry,* 121 U. S. 488; *Heath v. Wallace,* 138 U. S. 573; *McCormick v. Hayes,* 159 U. S. 332."

Again in *United States v. Schurz,* 102 U. S. 378, 400, this court said:

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the adminstration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale. The question whether any particular tract, belonging to the government, was open to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction.

> When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

Speaking with scientific accuracy the whole grant was mineral. As this court said in *Northern Pacific Railway Company v. Soderberg,* 188 U. S. 526, 530, "all lands belong to the ***mineral kingdom,*** and, therefore, could not be excepted from the grant without being destructive of it." The exception, therefore, must have a narrower interpretation, and that interpretation was indicated in the *Soderberg* case, where it is said at page 536: "We are of opinion * * * that mineral lands include not merely metalliferous lands but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture."

The question then turns on the value of the property at time of patent. Is it ***at that time*** the more valuable for "its deposits of a mineral character," or for

agricultural or other uses? This is a question most fit for the Secretary's determination. Lands today included within the grant, as being more "valuable" for agricultural or other purposes would tomorrow, if the question remains forever open, be excluded as being "mineral lands;" and it is inconceivable that this question of comparative value was forever to be left open to determination, varying and differing from time to time with changes in transportation facilities, discoveries in arts and sciences, and the ever varying price of the materials comprised in the earth's crust.

To avoid misunderstanding we repeat that we are dealing with the specific question asked by the court below, whether a patent issued under the circumstances described *"operates to convey* lands thereafter ascertained to be mineral",—whether, as to such lands, it is *void*. Whether such a patent is *voidable* is, as we have seen, a very different question. Beyond all doubt such a patent might be avoided or canceled in a suit seasonably brought by the government, on a showing of fraud or imposition in its procurement or in its issuance. Whether the circumstances supposed in the court's question, of absence of "investigation," and absence of "hearing," would justify its cancelation, would depend on what is meant by "investigation" and "hearing." A case is perhaps conceivable (though it is difficult to see how it could arise in the absence of fraud) where the issuance of the patent was so demonstrably a leap in the dark as to justify a court of equity in canceling it in a suit brought by the government for that purpose; but a mere showing that a special examination of the particular land had not been made, or that a hearing as to its quality had not been had, would not make out such a case. The De-

partment has general information as to the character of the lands within its jurisdiction. The Surveyor General when making the survey (and, of course, this must be made before the land can be patented) is required to note whether they are agricultural or mineral. If in a given case the Department saw fit to act upon this alone, without further inquiry or hearing, a patent so issued could not be canceled even in a direct suit brought by the government for that purpose. Questions of fraud and imposition being out of the way the formal action of the Department cannot be recalled merely because the Departmental officers did not perform their duty well. This is expressly recognized in the passage above quoted from the *Barden* case, at page 330, as well as in the language of Chief Justice Marshall above qnoted from *Polk's Lessee v. Wendall, supra.*

Because of the suggestion, at page 330 of the opinion in the *Barden* case, that additional legislation should be enacted, Congress at its ensuing session passed the act of February 26, 1895 (28 Stat. 683) providing for the classification of lands within the mineral belt of the Northern Pacific grant. By section 6 the classification of the commissioners, provided for by the act, is made "final;" and section 7 provides that no patent shall issue to the Northern Pacific Company for any land within the belt until it shall have been examined and classified as non-mineral. If, as the Government now contends, the patent is not decisive of the non-mineral character of the lands, why did Congress enact this prohibition against its issuance until after their non-mineral character should have been ascertained?

The court's question suggests, however, the additional qualification of a "patent to a railroad company

under a grant which excludes mineral lands * * * which is issued without * * * *determination* of the quality of the lands." We submit, with deference, that this involves a contradiction in terms. The patent *is* the determination, and, when issued "under a grant which excludes mineral lands," it necessarily determines that the lands described in it are of the class which the patentee is entitled to receive. To speak of a patent as not determining the facts necessary to its proper issuance is as if one were to speak of a judgment as not determining the facts necessary to its rendition. The analogy between patents and judgments in this aspect is well recognized (*Noble v. Union River Logging Railroad*, 147 U. S. 165, 173); and as a judgment is decisive not simply of the ultimate facts recorded in it, but as well of all of the antecedent facts necessary to its rendition—of "all the *media concludendi*," (*Fauntleroy v. Lum*, 210 U. S. 230, 237)—so a patent is a determination not only that the patentee is the owner of the lands described in it but as well that they are the kinds of lands which may properly be conveyed to him.

Finally we think it not too much to say that the appellant himself is not opposed to the views we have expressed on this point, for, in discussing this Second Question in his brief (pages 35-38), he starts out by stating that "it is not the question in controversy;" and he proceeds to swing the discussion over to what he conceives to be the question in controversy by the introduction into it of facts or alleged facts extraneous to the court's question. We have assumed, that, as this court has declined to order the entire record brought before it, it will answer the questions as they stand, and so we have discussed them as they stand.

THIRD QUESTION: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

This question necessarily supposes that the patent to which it refers is valid, or, at worst, is only voidable. If it were supposed to be void it could, of course, grant nothing, and there being no grant there could be no exception; there would be nothing on which the exception could operate. It is not to be supposed that the Circuit Court of Appeals is inquiring as to the validity of an exception to a void grant.

The reservation and exception in question is as follows:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of statute shall not be construed to include coal and iron lands."

This exception was incorporated in all railroad land grant patents issued prior to 1903, when, at the request of the Northern Pacific Railway Company (32 L. D. 342), and because this court had held that there was no authority for its inclusion (*Deffeback v. Hawke*, 115 U. S. 392, 406; *Davis's Administrator v. Wiebbold*, 139 U. S. 507, 527; *Shaw v. Kellogg*, 170 U. S. 312, 337) the practice of inserting it was discontinued. We print the decision of the Secretary of the Interior upon the question as Appendix "A" of this brief.

By its language the exception plainly refers to mineral lands which shall *thereafter be ascertained* to be such; for, as Mr. Evarts says in his brief (page 50) "the words 'should any such be found' certainly do not mean 'which have been found.'"

That this exception is void *as being inserted in the patent without authority,* is shown so conclusively in Mr. Evarts' brief (pages 53-80) that we can add little.

It seems proper to submit, however, that from the necessities of the case, and apart from any question of authority to make it, such an exception in a conveyance is nugatory, (1) because repugnant to the grant, and (2) because uncertain; and that at common law it has always been so regarded.

(1) It is an old and well established rule that an exception repugnant to the grant is void. The rule is thus stated by Chancellor Kent (4 Kent Com. 468):

> "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed and void, if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grants two acres, excepting one of them. The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dovehouse; or in the grant of a piece of land, excepting the trees or woods; or in the grant of a manor, excepting a close, *ex verbo generali aliquid excipitur.* If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made.' "

And by Chief Justice Parker of Massachusetts in *Cutler v. Tuffts,* 3 Pick. 277:

> "An exception," says Lord Coke, 1 inst. 47a, "is ever a part of the thing granted, and of a thing

> *in esse,* as an acre out of a manor; that is, out of a *general* a part may be excepted, but not part of a certainty, as out of twenty acres, one. Now, in the case before us, the thing granted is certain, that is a moiety of a certain tract of land; an exception, therefore, of one-half of this moiety would be like a grant of twenty acres excepting one."

This is not a mere artificial rule of law. It expresses merely the conclusion compelled by a common sense view of an instrument containing contradictory provisions; and the rule is applied today as consistently as in the time of Coke (see *Devlin on Real Estate, Third Edition,* 1911, Section 979 and cases cited). An instrument which grants lot 1 and excepts lot 1 is either self destructive, in which event there is no explanation as to why it was executed, and no effect whatever can be given to it; or one of its contradictory provisions must be disregarded, and in order to give any effect whatsoever to the instrument the provision to be disregarded must be the excepting clause. And what is true where the excepting clause is as broad as the grant, is equally true where it is as broad as and repugnant to any distinct part of the grant, as, for instance, a grant of lots 1 and 3 excepting lot 3.

Now, that the exception in question is repugnant to the granting clause is plain. It is *potentially* repugnant to it from the moment of the execution of the patent—i. e. the lands, or some specified sections of the lands conveyed *may* thereafter be found to be mineral lands;—and of course it must be *actually* repugnant to the granting clause before its provisions can be invoked or relied upon.

(2) It seems equally clear that the exception is void for uncertainty. The rule is thus stated by a recognized

authority (*Devlin on Real Estate*, Volume 2, Page 1933, Third Edition, 1911):

> "If the land conveyed is described as an entire tract excepting a parcel described, and the description of the parcel in the exception is vague and uncertain, the uncertainty will affect the exception only, and that will fail and not the grant."

For the exception to be good it must be possible for any one with the instrument in his hands, and from information which it contains either actually or by reference, to go at once upon the lands conveyed and determine which lands passed from the grantor and which were excepted and retained by him. This the holder of a patent containing the excepting clause in question, of course could never do, because no one could say what lands might at some time hereafter be found to be mineral lands.

There are a number of California cases, of which *VanNess v. Rooney*, 160 California, 130, is perhaps the most recent, which sustain this exception by construing it as applying to lands which were ***known to be mineral*** when the patent issued. These cases in effect hold that a patent containing this exception says substantially this: "I, the patentor, grant to you, the patentee, sections three, five, seven and nine, excepting, however, those sections *which have been found* to be mineral." The argument is that lands may be known mineral lands even though not known to the patentor to be such; and that if they are identifiable ***in fact*** by any one at the time of the grant, an exception of them in this form is valid even though the grantor himself might not be able at that time to identify them. We submit that as applied to the exception before us this is unsound for the following reasons:

1. It assumes language to be descriptive of an actual existing fact which logically and grammatically can refer only to a hypothetical situation which may or may not arise in the future. As stated in the passage of Mr. Evarts' brief (page 50) which we have already quoted, the words "should any such be found" certainly do not mean "which have been found."

2. The exception, even when read as applying only to *known* mineral lands, creates, potentially at least, an exception as broad as the grant, because all of them may be known to *some one* to be mineral; and even *VanNess v. Rooney*, supra, concedes, apparently, that such an exception is void, the court saying:

> "If *all* are mineral lands it may be that the exception is void; but the fact cannot be assumed as by its terms the exception is limited to such as are mineral lands, and does not *necessarily* extend to all the tracts granted."

No, it does not "necessarily" extend to all the tracts granted, but it *may* extend to all of them; and if the rights of mineral claimants had been recognized in nine sections it is difficult to see what answer could be made to the mineral claimant asserting exactly the same right to the tenth and last section covered by the same patent.

It is to be observed, moreover, that, even if sound, the doctrine of these cases is applicable only to lands which were *known* to be mineral previous to the issuance of the patent; and as there is much uncertainty as to what is meant by the term "known mineral land," unless that term shall be held to apply only to land which was not only mineral land in fact but which had been *formally claimed as such*, in proceedings of which there was *record evidence*, the doctrine

would render all railroad land grant titles utterly insecure. It would be open for any one, at any time, to say that a particular tract fell not within the grant but within the exception, and to support this contention by a mere oral showing that, previous to the issuance of the patent, *some one* knew it to be mineral land.

FOURTH QUESTION: If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with.

Clearly the question must be answered in the affirmative. The exception in the patent being *void* (as the question supposes), and the patent being at worst only voidable, the authorities are uniform upon the proposition that it is conclusive against a collateral attack.

Polk v. Wendall, 9 Cranch. 87, 97;
Johnson v. Towsley, 13 Wallace, 72, 83;
French v. Fyan, 93 U. S. 169;
Smelting Co. v. Kemp, 104 U. S. 636, 640;
Steel v. Smelting Co., 106 U. S. 447, 451;
Doolan v. Carr, 125 U. S. 618, 624;
Chandler v. Mining Co., 149 U. S. 79, 92;
Heath v. Wallace, 138 U. S. 573, 585;
McCormick v. Hayes, 159 U. S. 332, 348;
Burfenning v. Railway Co., 163 U. S. 321, 323.

SIXTH QUESTION: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Unquestionably it does. Of course, if there is in the patent a valid exception of certain lands, that is one thing. In that view the lands so excepted were never touched by the patent. They stood, the day after its issuance, precisely as they stood the day before its issuance. They were public lands of the United States, and any claimant was free to locate them under the mining laws without "attacking the patent" at all. The suggestion of a necessity for attacking the patent implies that the patent gave to the patentee some legal rights in them; and if that is so those rights would necessarily override any possible "equitable" right which might thereafter be acquired in them by location or by any step which a mineral claimant might take. The cases uniformly hold this.

Bohall v. Dilla, 114 U. S. 47;
Sparks v. Pierce, 115 U. S. 408;
Lee v. Johnson, 116 U. S. 48;
Sanford v. Sanford, 139 U. S. 642;
Ehrhardt v. Hogaboom, 115 U. S. 67;
Quinn v. Chapman, 111 U. S. 445.

ANSWER TO BRIEF FILED ON BEHALF OF THE UNITED STATES.

The main contention of the railroad companies is that when, under a railroad land grant, the Government issues to the grantee company a patent covering section one, that is a determination that section one is a section which, under the grant, the company is entitled to receive; and that if there has been no fraud or imposition or mistake that determination is conclusive.

The main contention of the Government in its brief, on the other hand, is that while this is so of a patent issued under the general public land laws, it is not so of a patent issued under a railroad land grant; that a railroad grant proceeds directly from Congress; the patent adds nothing to it; and it is not the function of the patent to define the limitations of the estate granted. Counsel for the Government say:

> "It is understood that in the present case the railroad company contend that the patent constitutes a conclusive adjudication that the lands therein described are non-mineral.
>
> The contention of the railroad company upon this question is founded upon the false premise that the presumptions applicable to patents issued under the general public land laws are also applicable to patents issued under direct grants from Congress, including railroad grants, whereas there is a fundamental distinction between these two classes of patents, which denies the application to the latter of the presumptions attending the former."

And again:

> "The principal purpose of a railroad patent is to furnish record evidence that the lands have

> been earned by construction of the railroad, and are not subject to forfeiture for breach of the condition requiring construction of the railroad; also that the lands described in the patent are odd-numbered sections within the exterior boundaries of the grant, and are situated opposite to and coterminous with a completed section of the railroad that has been accepted and approved."

And again:

> "Conceding that the patent involved in this case is a conclusive adjudication that the lands therein described were earned by construction of the railroad, and that the conditions of the grant have been performed as to those lands, and that the lands described are odd-numbered sections within the exterior boundaries of the grant, will it be contended that the effect of the patent as an adjudication of those facts (*which is the only effect that the patent can have*) is in any way impaired because the Secretary of the Interior did not also adjudicate the character of the land?"

It will be observed from the foregoing that counsel for the Government are at least consistent in their argument. They carry it to its logical conclusion. Mineral lands are not the only lands excepted from the grant. Lands to which any homestead claim, or any pre-emption claim, or any other claim, had attached at date of definite location, or which were then occupied by homestead settlers, are also excepted from it. Obviously if the patent is not decisive that the land is not excepted as being non-mineral, neither can it be held to be decisive that the land is not excepted as being within some one or other of the remaining excepted classes. Counsel meet this difficulty squarely. They say the patent *is not* decisive of either of these questions; and that when the Southern Pacific Rail-

road Company receives from the Government a patent covering section one *"the only effect that the patent can have"* is to say to the world that the Southern Pacific Railroad has been built, that section one "is an odd-numbered section," and that it lies within the exterior boundaries of the grant. If any one wishes to purchase the lands from the patentee, he takes them subject to the risk of losing them at any time on a showing that they were in one or the other of the excepted classes.

If this is the only information which the patent imparts, it is difficult to see why the Department should go to the trouble of issuing it; for the world knows, as courts know judicially, that the Southern Pacific Railroad has been built and accepted, and that the sections described in Southern Pacific patents are odd numbered sections, and whether or not they lie within the exterior boundaries of the grant. A patent which conveys only this information therefore, is of no value whatsoever; and it does not take the first step towards performing its primary function under the granting Act. Under section 4 of the Act, patents were to issue *"confirming* to said company the right and title to said lands;" and how can an instrument be said to *confirm* a title when it imports nothing save what is notorious, and leaves the title subject to collateral attack upon a dozen different grounds?

We submit that the contention of the Government in this respect is made in the very teeth of the decisions of this court. We believe that it has never been decided (certainly counsel cite us to no decision) that *"the only effect"* of a railroad land grant patent is the narrow one which counsel ascribe to it; nor has this court ever drawn any such distinction as the Government contends for between such a patent and a patent

under the general public land laws. It is not to the latter class of patents alone that the courts have ascribed a conclusive character. On the contrary, it has been of railroad land grant patents that the courts were speaking when some of the strongest expressions as to their conclusiveness were used. We quote some of these expressions below:

Barden v. N. P. R. R. Co., 154 U. S. 288, 327.

> "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

Wisconsin Central Railroad Co. v. Price Co., 133 U. S. 496, 510.

> "They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; *they would have obviated the necessity of any other evidence of the grantee's right to the lands;* and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government."

St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, 6.

> "There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands

as coterminous with the completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. *They would also obviate the necessity of any further evidence of the grantee's title.*"

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251.

"While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; *they would obviate the necessity of any other evidence of the grantee's right to the lands,* and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government."

Lake Superior, etc., Co. v. Cunningham, 155 U. S. 354, 375.

"That case (the *Barden* case) fully illustrates the extent to which the rule goes. The grant to the Northern Pacific was of lands 'non-mineral,' and it was held that it was a question of fact whether lands were mineral or non-mineral, and that question of fact was for the determination of the Land Department, *and when determined by it, conclusively settled.*"

Shaw v. Kellogg, 170 U. S. 312, 339.

"Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral,

did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, *but that division was only as to the time at which and the means by which the non-mineral character of the land was settled.* The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent *—it passed free from the contingency of future discovery of minerals."*

U. S. v. Winona & St. P. R. R. Co., 67 Fed. 948, 957. (Opinion by Judge Sanborn).

"On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroad or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, *the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack."*

If there is ground for the distinction which the Government draws between railroad grant patents and

patents under general land laws, the *Barden* case would have been pre-eminently the place in which to point it out. Yet Mr. Justice Field, instead of drawing any such distinction, accentuates their identity in legal effect, by quoting what the court had said of the conclusiveness of patents of the latter class, in support of what he says of railroad grant patents. And he quotes with approval, the language of Secretary Noble in *Central Pacific Railroad Co. vs. Valentine*, 11 L. D. 238, 246, where, *speaking of a railroad land grant patent*, the Secretary says:

> "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the offcers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of

policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property."

Again, the decisions of this court regarding patents issued under the swamp land acts show the unsoundness of the Government's contention. The swamp land grants, like the railroad grants, were grants *in praesenti;* and it has been held that the right of the States to the lands granted by them could not be defeated by failure to issue patent. Thus in *Wright v. Roseberry,* 121 U. S. 488, 499, it is said:

> "The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the swamp land act—'there is hereby granted.' Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. * * * It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made."

If the Government is consistent, therefore, it must argue that a patent under the swamp land act is not conclusive that the land covered by it *is* swamp land.

Except as to the description of the land granted the granting clause of that act is, in legal effect, the same as the granting clause in the railroad acts. The swamp act says that "swamp and overflowed lands are hereby granted"; and the railroad act says, in effect, that non-mineral lands are hereby granted; because of course a grant of "lands not mineral", or a grant of lands, excepting mineral lands therefrom, is exactly tantamount to a direct grant of *non-mineral lands;* and this is analogous, as the court says in *Wright v. Roseberry, supra,* to a direct grant of swamp lands; and there is exactly the same necessity for the Department to determine that railroad lands are *non-mineral* before issuing patent to them, as there is to determine that lands granted to the States under the swamp acts are *"swamp."* If, therefore, the Secretary's patent under the swamp land act is conclusive that the lands patented are swamp lands, the same reasons exist for holding it to be conclusive as to the *non-mineral character* of lands patented under railroad grants; and it is well settled that swamp land patents are conclusive as to the character of the land patented. Thus in *Wright v. Roseberry, supra,* it is said at page 300:

> "When identified, the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. *It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list.* The determination of the Secretary upon these matters, as shown by the patent, *would be*

> *conclusive as against any collateral attacks,* he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue."

See also *French v. Fyan,* 93 U. S. 169.

Again, the identity, in legal effect, of the patent issued under a railroad grant, with a patent issued under the homestead or pre-emption acts, is shown by the numerous cases in which, because of rights established by the homesteader or pre-emptioner previous to the issuance of the patent, it has been declared that the patent title granted to the railroad company was held in trust for the party thus entitled to it under general laws. According to the Government's contention this patent, as having been issued under a railroad grant, was conclusive of nothing except certain notorious facts—the construction of the road, the odd number of the section granted and its location within the boundaries of the grant. Yet this is the only title which the homesteader or pre-emptioner gets; and was it ever asserted by anyone that the title thus established was not exactly as good, and exactly as conclusive against collateral attack, as if the patent had been issued to him directly under the homestead or pre-emption act?

There is another difficulty in which the Government is involved by its argument and to which attention should be called. Beyond all question the railroad grants contemplated that lands might be selected within the indemnity limits, in lieu of those lost within the place limits because falling within some one or other of the excepted classes. But how could it be determined whether any lands had been lost within the place limits, unless it was contemplated by Congress that there should be a determination by the Land Department that they did or did not fall within one or other of those classes? According to the Government's contention this question remains open for all time. The Railroad Company could not say "We select this section within the indemnity limits in lieu of that section which we have lost within the place limits"; for the answer would be, "You don't know whether you have lost it or not; it may never be ascertained to be mineral or to have fallen within any of the excepted classes, and you may be allowed to keep it." Meanwhile the lands within the indemnity limits would be taken up, (because of course the Railroad Company has no rights in them until selection, and anyone can enter them in the meantime, *Oregon & C. R. R. Co. vs. United States,* 189 U. S. 103), and the provision for the selection of indemnity lands becomes a solemn mockery. It becomes a statement to the effect that "You can have other lands in lieu of those falling within the excepted classes; but you will never know whether they fall there or not."

Counsel for the Government do not discuss what is said in the *Barden* case to the effect that the patent is conclusive as to the non-mineral character of the land; but in the brief filed on behalf of appellants Lamprecht and Aiken, it is contended that what is said on this point in that case is *dictum*. But the authority

of that case upon this point cannot thus lightly be swept aside. It is true that in that case no patent had issued and it was not necessary for the court to determine what the effect of a patent would be. But as we have pointed out above, the question in which the entire controversy centered was as to when and how it should be taken as definitely settled that the railroad company did or did not have full title to the odd numbered sections lying within the place limits of its grant. This question having been thus fully presented and decided, the decision is of controlling authority even though the case might have been disposed of without any reference to it; for as said by this court in *Railroad Companies v. Schutte,* 103 U. S. 118, 143:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

That the decision in the *Barden* case has not been commonly regarded as *dictum* is apparent from the following decisions since rendered where it is treated as of controlling authority upon this very point:

Toltec Ranch Co. v. Cook, 191 U. S. 532, 541.
Lake Superior Ship Canal v. Cunningham, 155 U. S. 354, 375.
Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166.

Central Pacific R. R. Co. v. Nevada, 162 U. S. 512, 525.
Shaw v. Kellogg, 170 U. S. 312, 339.
U. S. v. Ry. Co., 160 Fed. 818, 820.
Le Marchel v. Teagarden, 152 Fed. 662, 666.
James v. Germania Iron Co., 107 Fed. 597.
U. S. v. Ry. Co., 148 Fed. 891.
Boynton v. Haggart, 120 Fed. 829.
Cosmos Co. v. Gray Eagle Co., 104 Fed. 47.

It is to be observed, finally, that in any aspect of the Government's argument it can apply only to *place* lands. As we have said the basis of that argument is that the Act of Congress itself grants the title, upon identification of the odd-numbered sections by definite location of the road; but this is true only of lands within the place limits. Title to lieu lands, or to lands within the indemnity limits, is dependent absolutely upon the Secretary's approval of the selection made. Upon his approval title takes effect by relation from the date of selection; and in giving his approval and issuing patent he must necessarily decide that the lands selected and patented are not within the excepted classes. *Weyerhaeuser v. Hoyt*, 219 U. S. 380, and cases there cited.

The Government's discussion of the Third Question carries throughout a kind of implication that the Department has never pretended to make any inquiry as to the mineral character of the lands patented, and that it has relied upon the excepting clause to prevent title to mineral land from vesting in the railroad grantee. This implication is directly opposed to the fact. We believe it to be the simple truth to say that the Department throughout has made that investigation and inquiry which has been thought necessary. This would be more or less searching and extended according as the land lay in closer or more remote

proximity to known mineral regions. This is apparent from the account given in the Secretary's decision in 1903 of the proceedings before the land department had upon lists and selections made under railroad grants. That decision is printed in full as Appendix "A" of this brief but we quote from it the following passage:

> "All such lists and selections are required to be filed in the local land office of the district in which the lands are situate and are, by the officers of that district, carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894, (19 L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list are eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this Department for approval and, upon such approval, the patent of the United States issues."

It will thus be seen that the insertion of this excepting clause was not prompted by a consciousness that no steps had been taken to ascertain whether the lands were mineral or not. Indeed the Secretary continued to insert it in the Northern Pacific patents down to

1903, notwithstanding the fact that after the Act of February 26, 1895 (28 Stat. 683), he issued no patents to the Northern Pacific Company covering lands in the mineral belt until after they had been examined and classified as non-mineral by the Commission provided for in that Act. After 1903 the exception was omitted until the early part of 1911.

In the brief filed on behalf of appellant Burke it is said (p. 168):

> "It may be noted in passing that, 1911, the secretary of the interior, acting under the advice of the department of justice, reversed the ruling of Secretary Hitchcock by returning to the practice of inserting the mineral exception in railroad patents."

This passage suggests that the Attorney General was of opinion that the excepting clause was valid. The exact opposite of this is the fact. We quote his opinion in full as Appendix "B" of this brief, showing that he was very clearly of the opinion that it was void, and that he suggested its insertion in the patent merely for the purpose of testing the question. The Secretary of the Interior, as a precautionary matter, has adopted his suggestion, and is now inserting the exception in patents now issued. Had counsel for the Northern Pacific Railway Company believed that *mandamus* would lie they would have pursued the course suggested by the Attorney General, and would have sought to compel the issuance of patents without the excepting clause; but as it was believed that *mandamus* would not lie (*Ness v. Fisher*, 223 U. S. 683) that company has accepted, under protest, such patents as have issued containing the excepting clause, pending the determination of the question in this litigation.

Counsel for the Government say:

"The Supreme Court of California has uniformly held that exceptions of mineral lands inserted in railroad patents are valid."

In support of this proposition they cite the six following cases:

McLaughlin v. Powell, 50 Cal. 64;
Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194;
Carr v. Dingley, 57 Cal. 395;
McLaughlin v. Heid, 63 Cal. 218;
Gale v. Best, 78 Cal. 240;
Van Ness v. Rooney, 160 Cal. 131.

Three of the cases cited, (*McLaughlin v. Powell, Chicago Quartz Mining Co. v. Oliver*, and *Van Ness v. Rooney*) do indeed sustain the exception; *but only as to known mineral lands.* In every one of those three cases there were *known* mineral claims of record before the issuance of the patent to the railroad company.

The three remaining cases cited by counsel to this proposition (*Carr v. Quigley, McLaughlin v. Heid* and *Gale v. Best*) do not support it in the slightest degree and we are at a loss to understand why counsel have cited them. *Carr v. Quigley* and *McLaughlin v. Heid* have nothing whatever to do with mineral exceptions to a grant, but present merely the question whether lands reserved, as being claimed under a Mexican grant, could accrue to a railroad grantee; and in *Gale v. Best*, the patent contained no mineral reservation whatsoever and the railroad company's title was sustained.

Counsel for the Government say:

"The theory upon which the California decisions have been rendered is that the exception is a part of the description of the lands covered by the patent. And this view seems to be sound."

If language which clearly looks to the future can be treated properly as referring to an existing condi-

tion, it may indeed be said that it is "sound" to treat the exception as a part of the description for the purpose of excepting *known* mineral lands. But that is as far as the theory can be carried. It cannot possibly be applied to *unknown* mineral lands. The unknown cannot be made descriptive of anything, nor can it possibly be described.

Counsel for the Government refer to the decisions holding that in placer patents it is proper to insert an exception of *known* lodes, and they say:

> "The decisions in the cases just cited are strictly analogous to the case at bar. What difference does it make that in those cases the exception was of 'known' lodes?"

It makes the "difference" between a good description and a bad one. If the exception in this case could be treated, in spite of its language, as referring to an *existing known situation,* it would be certain, or susceptible of being made certain, and the grantee could determine at once what had been granted and what had been withheld. But a grant of section one, excepting so much of it as may *at any time in the future* be ascertained to be mineral, is as if a man were to grant section one, excepting so much of it as at any time thereafter he might desire to keep. The question how much of it he might at any time thereafter desire to keep is as susceptible of definite ascertainment as is the question how much of it may at any time in the future be found to be mineral. Such an exception renders the instrument not a conveyance but a travesty, and to sustain it is to deprive the patent of all its effect.

CHARLES W. BUNN,
CHARLES DONNELLY.

APPENDIX "A."

RAILROAD GRANT-PATENT-EXCEPTION OF MINERAL LANDS.

NORTHERN PACIFIC RAILWAY CO.

There is no authority for the insertion, in patents issued under railroad land grants of the clause, "excepting all mineral land, should any such be found in the tracts aforesaid;" and directions are given that in all future railroad land grant patents said excepting clause be excluded.

Secretary Hitchcock

To the Commissioner of the General Land Office,

(F. L. C.) December 10, 1903. (F. W. C.)

The Department has considered the request by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, that you be instructed to eliminate the following clause from patents issued under its land grant, namely:

> yet excluding and excepting all mineral land should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be held to include iron or coal lands.

In reporting upon said request your office letter of December 11, 1901, states that it is questionable whether there is authority for its insertion, but that—

> this excepting clause has always been introduced into the patents issued to the company which now cover millions of acres of its grant, and this has also been done in the patents issued under all other railroad land grants having a like excepting clause.

MINERAL LANDS EXCEPTED.

All mineral lands, other than coal and iron, are excluded from the Northern Pacific land grant, whether known or unknown at the time of the attachment of rights thereunder, either by definite location or selection. *Barden v. Northern Pacific R. R. Co.* (154 U. S. 288).

WHO SHALL DETERMINE THE CHARACTER OF THE LAND WITHIN THE LIMITS OF A RAILROAD GRANT?

The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the land department. In *Litchfield v. Register and Receiver* (9 Wall. 575, 577) it was said:

> The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion.

In *Steel v. Smelting Company* (106 U. S. 447, 450, 455) it was said:

> We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the sub-

ject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *Burfenning v. Chicago, St, Paul, etc.* (163 U. S. 321, 323) it was said:

> Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 62; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332.

In *Northern Pacific R. R. Co. v. Sanders*, (166 U. S. 620, 635) it was said:

> Whether the lands sought to be purchased as mineral lands were of that character was a matter for the determination, in the first instance, of the

> land department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands.

In *Barden v. Northern Pacific R. R. Co., supra* (pages 328, 329), it was said:

> If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent.

These cases clearly establish the jurisdiction of the land department in the premises.

PROCEEDINGS BEFORE THE LAND DEPARTMENT HAD UPON LISTS AND SELECTIONS MADE OF LANDS UNDER A RAILROAD LAND GRANT PRECEDING THE ISSUE OF PATENTS THEREON.

All such lists and selections are required to be filed in the local land office of the district in which the lands are situate and are, by the officers of that district, carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894 (19 L. D. 21), they are again thoroughly examined in connection with the

records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list are eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this Department for approval and, upon such approval, the patent of the United States issues.

ISSUE OF PATENT FOR LANDS UNDER A RAILROAD LAND GRANT DETERMINATIVE OF THE CHARACTER OF THE LANDS PATENTED.

As before shown, it is the duty of the land department to determine primarily the character of the lands within the limits of all railroad land grants and the usual rule fixing a time for the attachment of rights under such grants does not estop inquiry into this matter by that department. When, however, the land department, charged with this duty, and after due investigation of the matter as provided for by its rules and regulations, patents lands as falling within the terms of these grants, such action is necessarily determinative of the character of the lands patented.

EFFECT OF SUCH DETERMINATION.

When the law has confined to a special tribunal the authority to hear and determine certain matters, its

determination, in the absence of fraud, is conclusive upon all others. *Johnson v. Towsley* (13 Wall. 72, 83).

In the case of *Barden v. Northern Pacific R. R. Co., supra,* the court (pages 330 and 331) states that—

> It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard of their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive proceedings respecting the title.

In certain cases involving the question as to the character of lands claimed under the grant made to

the States of swamp and overflowed lands, the courts have permitted the introduction of oral evidence to determine the character of such lands, but these cases are carefully considered in the case of *McCormick v. Hayes, supra,* where it is said by the court (page 342 of its opinion):

> There is in this case no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the Secretary *had made any decision,* the evidence would have been excluded.

It follows that, in the absence of fraud, the determination effected by the issue of patent as to the character of the lands patented is conclusive, and that the insertion of the clause hereinbefore referred to is without effect and can serve no good purpose.

EXCEPTIONS CONTAINED IN LETTERS PATENT OF THE UNITED STATES.

It has been shown that it is as much the duty of the land department to determine whether lands are excepted from a railroad land grant because mineral in character, as it is to determine whether they are excluded because embraced in some other term of exception found in the granting act, that the issue of patent under such a grant is a determination that the lands patented are of the character granted, and that in the absence of fraud such determination is conclusive.

Why, then, should one term of exception be carried into the patent when all others are excluded?

In *Davis v. Weibbold* (139 U. S. 507) the question as to the effect to be given to excepting clauses found in patents issued under acts of Congress providing for the disposal of public lands, was fully considered

by the court, and on pages 527-528 of its opinion it was said—

> But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the land department, resting for their fitness only upon the judgment of those officers. *Deffeback v. Hawke,* 115 U. S. 392, 406.

In *Deffeback v. Hawke* it was said:

> The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.

There is clearly, therefore, no warrant for the insertion in patents, issued under the railroad land grants, of the clause "excepting all mineral land should any such be found in the tracts aforesaid." If any statement in this connection were deemed necessary in the patent, which is not believed to be the case, it should be to the effect that the lands patented are found to be non-mineral in character and otherwise subject to the grant.

The letter from the railway company, now under consideration, in referring to said excepting clause, states that—

> Whilst its inclusion cannot in law lessen the title acquired by the company, it can and frequently does induce innocent third parties not well versed in the law to engage in vexatious and expensive litigation in the belief that there may be excepted from the patent to the railroad company any minerals which shall be found in the patented lands thereafter.

After careful consideration of the matter, therefore, the request is granted, and you are directed, in future, to exclude said excepting clause from all railroad land grant patents.

APPENDIX "B."

DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY-GENERAL
WASHINGTON, D. C.

"W. A."
153972-46 March 29, 1911.

The Honorable,
The Secretary of the Interior.

Sir:

Judge Ross, in the United States Circuit Court for the Southern District of California, has handed down a decision in the case of *Roberts* against *Southern Pacific Company*, a copy of which I enclose for your information. This is the case concerning which there has been some correspondence between your Department and mine, arising out of the land grants to the Southern Pacific Railroad Company and the construction of the exception incorporated in the patents issued by the Interior Department prior to 1903, in the following language:

> "Yet excluding and excepting 'all mineral lands' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land' ".

The Court in effect holds (first) that it was the duty of the Secretary of the Interior to ascertain prior to the granting of patents whether or not the lands selected were mineral lands, and that, having reached the conclusion that they were not, that conclusion, in the absence of fraud was final. This construction of the act is undoubtedly fortified by the provisions of

the act of July 27, 1866 (14 Stats., 292), Section 3, which, among other things, provides:

> "That all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

In other words, if the lands originally selected are found to be mineral lands, the railway company is given the right of alternative selection over other unoccupied agricultural lands. Obviously this privilege might be entirely lost if because years after a patent was issued, petroleum or some other mineral substance, should be found to exist in lands granted by patent pursuant to the original selection the grant should fail, and in the meantime all agricultural land from which selection might otherwise be made should have been taken up by other entrymen.

The Court holds that it was not competent for the Secretary of the Interior to insert the continuing "floating" exception of the character above quoted which should attach to the land if in the future it should be found that the land was mineral in character. As a matter of fact the language of the exception is ambiguous. It might possibly be construed to apply to the present or to the future; that is, the Secretary of the Interior, without making any investigation, might have intended by this exception to reserve from the operation of the grant any lands which at that time were known or at any future time should prove to be mineral lands; or it might be that having made an investigation and being unable to find that any of the lands were mineral in character, he attempted to protect the interests of the Government against the future

discovery of mineral by using this language for the purpose of excepting from the operation of the grant tracts of land in which subsequently minerals might be discovered.

The reasoning of the Court in respect to the legality of this practice seems to me to be conclusive. Congress granted in aid of the construction of the railroad, certain sections of public land, not mineral, and authorized the company to select the lands under the direction of the Secretary of the Interior, and upon completion of sections of railroad for service, that patents should issue to the company, confirming to it the right and title to said lands. The purpose of this grant was to encourage and assist the railroad company to construct its lines. Obviously if the estate granted was incumbered with a "floating" indefinite species of condition subsequent, its market value would be greatly impaired.

Of course, it may be said that if the contention that all mineral lands are excluded from the operation of the grant and the patents, then mineral lands are not part of the granted estate, and the expression of an exception cannot operate to impair it. It is not unusual for large areas of land to be granted reserving to the grantor all land of a particularly designated character within its boundaries; e. g., timber lands, saline lands, etc. In such cases it is the duty of the grantee to ascertain for himself what lands fall within the exceptions.

Upon the representation to the Interior Department that the Southern Pacific Railway Company had received patents to a considerable amount of lands which had been found to be mineral in character, and in view of the question which was mooted in this Roberts suit, your Department decided some months ago to

withhold the issue of any patents to the Southern Pacific Company. It would seem to me that since this decision above referred to, there is no substantial reason why the issuance of future patents should be upheld.

The further question, however, arises upon which you asked my opinion some time since; namely, whether or not the patents to be hereafter issued should contain an exception similar to that above quoted, which was the practice of the Department prior to 1903, or should contain such an exception. If Judge Ross' opinion is sound, as I believe it to be, it would not be proper to insert an exception in a deed; but if any exception is inserted it should be clear and not ambiguous. I am advised that the Roberts case will be appealed to the Circuit Court of Appeals, and it is, of course, possible that the Court of Appeals may take a different view of the case, although I think it most improbable. But if you should deem it best to guard against any possibility of a different view being taken by the Court of Appeals from that expressed by Judge Ross, you might during the pendency of the appeal and until the case is finally decided, issue patents containing an exception which would clearly except from the operation of the grants "All lands mineral in character now known or hereafter discovered to be such". Possibly if you tendered to the Railway Company a patent in that form they might apply to the Court to mandamus the issuance of a patent without the exception, which would bring squarely before the Supreme Court of the District of Columbia the right of the Secretary of the Interior to insert such a clause in the patent.

I make this suggestion merely out of an abundance of precaution and in order to suggest a method of

affording absolute protection to you from taking any action which may fail to fully protect the interests of the United States in the premises.

Respectfully,

(Signed) GEO. W. WICKERSHAM,

Attorney-General.

Enc. 7972.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 682.

EDMUND BURKE, APPELLANT,

v.

SOUTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES FOR PERMISSION TO FILE A BRIEF AND PARTICIPATE IN THE ORAL ARGUMENT OF THE CAUSE AND FOR ADVANCEMENT OF THE HEARING.

The Solicitor General, on behalf of the United States, moves that the United States be granted permission to file a brief and to participate in the oral argument of this cause, and that this cause be advanced for hearing at some date not earlier than January 1, 1913, for the following reasons:

Decision of the questions certified to this court will necessarily determine whether the patent directly involved, or any similar patent, is, in law, effective to pass title to certain lands notwithstanding the fact that some or all of such lands are mineral lands of a character forbidden to be granted

by the very acts of Congress under which such patent is issued, and notwithstanding the existence in the patent itself of a provision purporting expressly, but without particular designation of tracts, to except all mineral lands, should any be found, from the premises granted.

Under the act of July 27, 1866, 14 Stat., 292, and the joint resolution of June 22, 1870, 16 Stat., 382, patents have heretofore been issued to and accepted by the Southern Pacific Railroad Company containing such express exceptions of all mineral lands (exclusive of iron and coal), but including in their general description many thousands of acres of land now known to be chiefly valuable for the deposits of petroleum therein contained.

The railroad company and its successors in interest now claim title to all these lands, notwithstanding the exceptions contained in the patents, asserting that the exceptions are inoperative and void.

The Government, on the other hand, believing the exceptions to be valid, holds that all such lands are the property of the United States, and is preparing in the near future to institute in the District Courts appropriate legal proceedings for the purpose of vindicating its claim and of securing an accounting for large quantities of oil which have been extracted from the lands without its consent. These petroleum lands are of immense value, and the right of the United States thereto

and of its citizens to make entry and purchase thereof under the general mining laws, are matters of much public importance, particularly in the State of California, where the lands are situated.

Analogous questions exist in respect of lands which are known, or reasonably believed, to be mineral and not intended to be granted, but which are included within the general descriptions of numerous patents heretofore issued to the Northern Pacific Railway Company, and other railway corporations, under railway aid provisions similar to those above referred to. All such patents contain exceptions identical with or substantially the same as the exception contained in the patent involved in the case at bar.

It is thus apparent that a decision by this court of the questions now before it by certification will be determinative of or may seriously affect the rights of the United States in regard to a subject matter of very serious importance and of the duties of its executive officials in respect of past and future transactions related thereto.

Notice of this motion has been served upon counsel representing the parties to the cause.

Respectfully submitted.

WILLIAM MARSHALL BULLITT,
Solicitor General.

October 14, 1912.

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